80-1067

No. 80-

Supreme Court, U.S.
FILED
DEC 29 1980
ALEXANDER L. STEVAS, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, APPELLANT

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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DECEMBER 29, 1980

QUESTION PRESENTED

Whether a provision of the Presidential Election Campaign Fund Act which limits the amount of money that certain political committees may spend to further the election of publicly financed presidential candidates is consistent with the First Amendment to the Constitution of the United States, where Congress has determined that such a limit promotes compelling governmental interests and is necessary to preserve public funding as an alternative means of financing presidential election campaigns.*

* Other parties to this proceeding are Americans for an Effective Presidency and Fund for a Conservative Majority.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Statutory Framework	2
B. The Parties	4
C. The Proceedings Below	5
ARGUMENT	8
I. THE DISTRICT COURT HELD UNCONSTITUTIONAL AN INTEGRAL PROVISION OF THE PRESIDENTIAL ELECTION CAMPAIGN FUND ACT	8
A. The Provision At Issue Is a Necessary Part Of The Public Financing Scheme	8
B. 26 U.S.C. § 9012(f) is Consistent with First Amendment Freedoms Of Speech and Association	15
II. THE DECISION OF THE DISTRICT COURT CONFLICTS WITH *BUCKLEY* v. *VALEO* AND *REPUBLICAN NATIONAL COMMITTEE* v. *FEDERAL ELECTION COMMISSION*	21
A. The District Court Misapplied *Buckley* v. *Valeo*	22

ARGUMENT—Continued Page

B. The District Court Misapplied *Republican National Committee* v. *Federal Election Commission* When It Concluded that 26 U.S.C. § 9012(f) Does Not Further a Compelling Governmental Interest in Eliminating Corruption 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

American Civil Liberties Union v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *American Civil Liberties Union*, 422 U.S. 1030 (1975) 18

Bread Political Action Committee v. *Federal Election Commission*, No. 80-1146 (7th Cir. Dec. 5, 1980) (*en banc*) 20

Buckley v. *Valeo*, 519 F.2d 817 and 821 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976) ..... *passim*

Burroughs & Cannon v. *United States*, 290 U.S. 534 (1934) 14

California Medical Association v. *Federal Election Commission*, Fed. Elec. Camp. Fin. (CCH) ¶ 9127 (9th Cir. May 23, 1980), *possible jurisdiction postponed*, No. 79-1952 (Oct. 6, 1980) .... *passim*

Civil Service Commission v. *Letter Carriers*, 413 U.S. 548 (1973) 16, 17, 18

Gelman v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 (D.C. Cir. July 18, 1980), *cert. denied*, —— U.S. ——, 49 U.S. L.W. 3227 (October 6, 1980) 23

Linmark Associates v. *Township of Willingboro*, 431 U.S. 85 (1977) 16

Louisville Gas Co. v. *Coleman*, 277 U.S. 32 (1928) .. 14

Marchioro v. *Chaney*, 442 U.S. 191 (1979) 15

Mott v. *Federal Election Commission*, 494 F. Supp. 131 (D.D.C. 1980), *apeal docketed*, No. 80-1949 (D.C. Cir. Aug. 12, 1980), No. 80-2069 (D.C. Cir. Sept. 4, 1980) 21

Pell v. *Procunier*, 417 U.S. 817 (1974) 16

CASES—Continued

	Page
Republican National Committee v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y. 1980) (three-judge court) and 616 F.2d 1 (2d Cir. 1980) (en banc) (per curiam) *aff'd mem.* 445 U.S. 955 (1980)	*passim*
United Public Worker v. *Mitchell*, 330 U.S. 75 (1947)	18
United States v. *National* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972)	18
United States v. *United Automobile Workers*, 352 U.S. 562 (1957)	14

STATUTES AND REGULATIONS

2 U.S.C. § 431(4)	4, 5, 24
2 U.S.C. § 431(8)(B)(i)	3, 4, 17
2 U.S.C. § 431(8)(B)(ii)	3, 18
2 U.S.C. § 431(8)(B)(iv)	3, 18
2 U.S.C. § 431(8)(B)(xii)	3, 18
2 U.S.C. § 431(9)	17
2 U.S.C. § 431(9)(B)	3
2 U.S.C. § 431(17)	3, 17
2 U.S.C. § 434	5
2 U.S.C. § 437c(b)(1)	5
2 U.S.C. § 437d(a)(6)	5
2 U.S.C. § 437d(e)	5
2 U.S.C. § 441a	15
2 U.S.C. § 441a(a)(1)	19
2 U.S.C. § 441a(a)(4)	4, 25
2 U.S.C. § 441a(b)(1)(B)	11, 12
2 U.S.C. § 441a(b)(1)(C)	11
2 U.S.C. § 441a(d)(2)	4, 18
Former 18 U.S.C. § 608(a)	22, 23
Former 18 U.S.C. § 608(c)	22, 23
Former 18 U.S.C. § 608(e)(1)	22, 23
Former 18 U.S.C. § 608(f)	18
26 U.S.C. § 501(c)	17
26 U.S.C. § 9002(1)	3
26 U.S.C. § 9002(4)	11
26 U.S.C. § 9002(6)	11
26 U.S.C. § 9002(7)	11

STATUTES AND REGULATIONS—Continued Page

26 U.S.C. § 9002(8) 11
26 U.S.C. § 9002(9) ..... *passim*
26 U.S.C. § 9002(11) 3, 6
26 U.S.C. § 9003 ..... 3, 11
26 U.S.C. § 9003(b)(1) 6, 12
26 U.S.C. § 9003(b)(2) 3, 6, 12
26 U.S.C. § 9004(a)(1) 11, 12
26 U.S.C. § 9004(a)(2) 11
26 U.S.C. § 9004(a)(3) 11
26 U.S.C. § 9005(a) 5
26 U.S.C. § 9006 3
26 U.S.C. § 9007(a) 5
26 U.S.C. § 9007(b) 5, 12
26 U.S.C. § 9007(b)(3) 12
26 U.S.C. § 9010(c) 5
26 U.S.C. § 9011(b) 1, 5, 26
26 U.S.C. § 9012(a) 3
26 U.S.C. § 9012(a)(1) 6
26 U.S.C. § 9012(b) 3, 12
26 U.S.C. § 9012(b)(1) 6, 12
26 U.S.C. § 9012(f) ..... *passim*
26 U.S.C. § 9036(a) 5
26 U.S.C. § 9036(b) 5
26 U.S.C. § 9040(b) 5
26 U.S.C. § 9040(c) 5
26 U.S.C. § 9040(d) 5
28 U.S.C. § 1252 1
28 U.S.C. § 1331 6
28 U.S.C. § 2101(b) 1
Pub. L. No. 90-26, 81 Stat. 41 (1967) 9
Pub. L. No. 92-178, 85 Stat. 573 (1971) 9
Pub. L. No. 93-443, §§ 403-405, 88 Stat. 1263 (1974) 9
Pub. L. No. 94-283, §§ 301-304, 90 Stat. 475 (1976) 9

LEGISLATIVE HISTORY

117 Cong. Rec. 41,746 (1971) 9
117 Cong. Rec. 41,747 (1971) 9

LEGISLATIVE HISTORY—Continued

	Page
117 Cong. Rec. 41,762 (1971)	11
117 Cong. Rec. 41,777 (1971)	16, 19
117 Cong. Rec. 41,777-81 (1971)	10
117 Cong. Rec. 41,780 (1971)	13
117 Cong. Rec. 41,947 (1971)	10
117 Cong. Rec. 42,397 (1971)	12, 13
117 Cong. Rec. 42,399 (1971)	14, 16
119 Cong. Rec. 38,900 (1973)	10
120 Cong. Rec. 10,546 (1974)	10
Hearings on S. 382 Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 92d Cong., 1st Sess. (1971)	10
Hearings on S. 1103, S. 1954 and S. 2417 Before the Senate Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 93d Cong., 1st Sess. (1973)	10
S. Rep. No. 93-1239, 93d Cong., 2d Sess. (1974)	10
S. Rep. No. 92-553, 92d Cong., 1st Sess. (1971)	11
H.R. Rep. No. 94-917, 94th Cong., 2d Sess. (1976)	13

MISCELLANEOUS

First Amendment, United States Constitution	*passim*
United States Constitution, art. I, § 8, cl. 2	2, 22
Final Report to Committee on House Administration by the Campaign Finance Study Group, The Institute of Politics, Harvard University (May 1979)	28
ABC World News Tonight, November 5, 1980	27
CBS Evening News, November 5, 1980	28
News Comments of Vice President Walter F. Mondale, St. Paul, Minnesota, November 5, 1980	28

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*) is not yet officially reported.

JURISDICTION

A three-judge district court was convened pursuant to 26 U.S.C. § 9011(b) to "implement or construe" 26 U.S.C. § 9012(f). On August 28, 1980, the three-judge court entered two expedited orders granting, *inter alia*, appellees' motions for summary judgment. App. B, *infra*. On September 30, 1980, the court issued an opinion holding 26 U.S.C. § 9012(f) unconstitutional and entered a further order disposing of the case consistent with its earlier orders. App. A, *infra*. A timely notice of appeal was filed on October 8, 1980, App. D, *infra*. On November 19, 1980, this Court granted the Federal Election Commission's motion for an extension of time within which to file this Jurisdictional Statement. App. E, *infra*. Jurisdiction is conferred by 26 U.S.C. § 9011 (b) and 28 U.S.C. §§ 1252 and 2101(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . .

26 U.S.C. § 9012(f) provides in relevant part:[1]

> . . . [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

STATEMENT OF THE CASE

A. The Statutory Framework

During the 92nd Congress, two landmark bills dealing with the regulation of campaign finance were enacted: the Federal Election Campaign Act of 1971 ("FECA"), and the Presidential Election Campaign Fund Act of 1971 ("the Fund Act"). Together, the two statutes represent a comprehensive congressional effort to minimize the corrosive effects of aggregated wealth on the integrity of the political process.

The Fund Act established the Presidential Election Campaign Fund, financed by the voluntary tax-

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[1] The Federal Election Commission has lodged with the Court 10 copies of *Federal Election Laws* which sets forth the Presidential Election Campaign Fund Act and the Federal Election Campaign Act of 1971, as amended. The complete text of 26 U.S.C. § 9012(f) appears therein at 71-74.

payer check-off system, to serve as an alternative means of financing presidential general election campaigns. Major party candidates who satisfy the eligibility requirements outlined in 26 U.S.C. § 9003 are entitled to equal payments from the fund to defray all of their "qualified campaign expenses", *i.e.*, expenses incurred by a presidential candidate and running mate, or any of their authorized committees,[2] to further their election. 26 U.S.C. § 9002(11). Once a candidate has chosen a publicly financed campaign, he or she may accept private contributions only as they are necessary to make up for any deficiency in the fund. 26 U.S.C. §§ 9003(b)(2), 9012(b). In no event, however, may a publicly funded candidate spend more than his or her allotment under 26 U.S.C. § 9006. 26 U.S.C. § 9012(a). The provision in question, 26 U.S.C. § 9012(f), serves as a necessary safeguard to the public financing scheme. Section 9012(f) limits expenditures in excess of $1,000 by political committees other than those authorized by the candidate where such expenditures are made to further a publicly funded candidate's election and would, if incurred by the candidate's authorized committees, constitute qualified campaign expenses.

Despite these necessary restrictions, both FECA and the Fund Act contain numerous provisions carefully designed to encourage grass-roots political activity,[3] to allow individuals and groups to spend substantial sums in connection with presidential elections,[4] and to enable political parties to play a strong

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[2] The term "authorized committee" is defined to mean any political committee which is authorized in writing by the candidates to further their election. 26 U.S.C. § 9002(1).

[3] *See, e.g.*, 2 U.S.C. § 431(8)(B)(i) and (xii).

[4] *See, e.g.*, 2 U.S.C. § 431(8)(B)(ii) and (iv); 26 U.S.C. §§ 9002(9) and 9012(f); 2 U.S.C. § 431(9)(B) and (17).

role in furthering the election of their nominees.[5] Considered as a whole, the public financing system represents "a Congressional effort not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process. . . ." *Buckley* v. *Valeo*, 519 F. 2d 817 and 821 (D.C. Cir. 1975) *aff'd. in part, rev'd. in part* 424 U.S. 1, 92-93 (1976).

B. The Parties

Appellee Americans for Change ("AFC") is an unincorporated association and a political committee within the definition of 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AFC registered with the Federal Election Commission ("Commission") as a political committee by filing its Statement of Organization on June 3, 1980, and has since qualified as a multi-candidate political committee under FECA.[6]

Appellee Fund for a Conservative Majority ("FCM") is a multi-candidate political committee, registered with the Commission. FCM originally registered in 1972 with the General Accounting Office as "Young Americans Campaign Committee." On October 13, 1976, FCM filed an amendment changing its name to Fund for a Conservative Majority. "Citizens for Reagan in 1980" is a "project" of FCM which is not separately registered with the Commission.

Appellee Americans for an Effective Presidency ("AEP") is an unincorporated association which is

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[5] *See, e.g.*, 2 U.S.C. § 441a(d)(2); 2 U.S.C. § 431(8)(B)(i).

[6] The term "multi-candidate political committee" is defined to mean "a political committee which has been registered under [2 U.S.C.] section 433 for a period of not less than 6 months, which has received contributions from more than 50 persons, and, . . . has made contributions to 5 or more candidates for federal office." 2 U.S.C. § 441a(a)(4).

a political committee as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AEP registered with the Commission as a political committee by filing its Statement of Organization on July 8, 1980.[7]

Appellant Federal Election Commission is the independent agency of the United States government vested with the authority to litigate questions involving the construction, implementation and validity of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, as well as the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. The Commission is also vested with primary and exclusive jurisdiction with respect to civil enforcement of these laws. *See* 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e); 26 U.S.C. §§ 9005(a), 9007(a) and (b), 9010(c), 9011(b), 9036(a) and (b), 9040(b), (c) and (d). Common Cause, a membership organization, was not a party to the district court's ruling regarding the validity of 26 U.S.C. § 9012(f). App. A at 28a; *see* discussion, *infra* at note 8.

C. The Proceedings Below

On July 15, 1980, the Commission initiated the instant action pursuant to 26 U.S.C. §§ 9010(c) and 9011(b) seeking a declaratory judgment that appellees' expenditures violate 26 U.S.C. § 9012(f) and that the provision is constitutional. A three-judge district court was convened and an expedited schedule set. On July 17, 1980, Common Cause filed a mo-

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[7] Although AEP's reports to the Commission, filed pursuant to 2 U.S.C. § 434, indicate that AEP has contributed to 14 federal candidates and has received contributions from more than fifty persons, it has not yet satisfied the six month registration requirement to qualify as a multi-candidate political committee under FECA.

tion to intervene as a party plaintiff and to consolidate the Commission's action with *Common Cause* v. *Schmitt*, No. 80-1609 (D.D.C.) (three-judge court). On August 28, 1980, the district court issued two expedited orders granting, *inter alia*, summary judgment for the defendants in the action brought by the Commission, denying the motion of Common Cause to intervene in the Commission's suit, and dismissing the Common Cause suit.[8] By order dated

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[8] Common Cause, David Cohen and Winifred Long brought suit seeking a declaration that AFC, AEP, FCM and certain officers thereof were in violation of various provisions of the Fund Act and requesting injunctive relief. Count I of their amended complaint alleged that the activities of the defendants violated 26 U.S.C. § 9012(f). See *Common Cause* v. *Schmitt*, No. 80-847, Appendix to Jurisdictional Statement at 77a-81a. Count II of their amended complaint alleged that defendants' activities resulted in violations of 26 U.S.C. §§ 9002(11), 9003(b)(1)-(2), 9012(a)(1) and 9012(b)(1) in that defendants' expenditures would be "conducted in tandem with and parallel to the official Reagan campaign." *See* Common Cause Appendix at 81a-82a. Jurisdiction was alleged on the basis of 26 U.S.C. § 9011(b) and 28 U.S.C. § 1331. The Commission was allowed to intervene in the Common Cause action and moved to dismiss Common Cause's complaint for lack of subject matter jurisdiction. App. A at 32a.

The court dismissed Count II of Common Cause's action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. App. A at 29a. In so ruling, the court agreed with the Commission that Count II represented an impermissible attempt by a private plaintiff to enforce the Fund Act in direct contravention of the Commission's exclusive enforcement jurisdiction. App. A at 31a-32a. Common Cause has expressly declined to appeal the dismissal of Count II. *See* Jurisdictional Statement, *Common Cause* v. *Schmitt*, No. 80-847 at 10 n.15.

In addition, the court dismissed Count I of the Common Cause complaint as mooted pursuant to its decision in the Commission's action. The court expressed "no opinion as to whether Common Cause possessed the requisite Article III

September 25, 1980, the court consolidated the two cases. App. C, *infra.*

The court set forth its reasoning for its orders of August 28 in an opinion dated September 30, 1980. *See* App. A, *infra.* At the outset, the court found that § 9012(f) proscribes categorically appellees' expenditures. Properly rejecting the "limiting construction" offered by various appellees, the court concluded that § 9012(f) prohibits all expenditures in excess of $1,000 by unauthorized political committees on behalf of candidates who choose a publicly funded campaign. App. A at 7a.

Moreover, the court, proceeding under the assumption that the analysis in *Buckley, supra,* "controls the election law case before this court," and relying in particular upon the distinction drawn therein between expenditures and contributions, concluded that 26 U.S.C. § 9012(f) does not serve a sufficiently compelling governmental interest to outweigh what the court perceived to be a burden imposed on speech. App. A at 9a, 21a. Based on this limited analysis, which accorded no consideration to the implicit objectives of the public financing scheme nor to the alternative avenues available for individual participation in the electoral process, the district court held 26 U.S.C. § 9012(f) facially unconstitutional under the first amendment.

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characteristics to press Count I of its lawsuit." App. A at 28a. In its Jurisdictional Statement, Common Cause has requested that this Court remand its case for factual development. The Commission presumes that the district court would resolve the jurisdictional ambiguities in the course of any such remand of the Common Cause suit.

ARGUMENT

I. THE DISTRICT COURT HELD UNCONSTITUTIONAL AN INTEGRAL PROVISION OF THE PRESIDENTAL ELECTION CAMPAIGN FUND ACT

This case involves the validity of a provision of the Presidential Election Campaign Fund Act and, consequently, poses substantial questions concerning the authority of Congress to enact legislation protecting the integrity of the electoral process. The Fund Act is a complex, delicately balanced statutory scheme, carefully designed to promote first amendment values. In enacting 26 U.S.C. § 9012(f), the provision in question, Congress determined that unlimited spending by unauthorized committees to defray what would otherwise be qualified campaign expenses on behalf of publicly funded candidates would upset this integrated scheme, pose a danger of real or apparent corruption and undermine the goals of public financing.

The judgment appealed from represents the first occasion wherein a provision of the Fund Act has been found constitutionally infirm. In so ruling, the court below failed to consider § 9012(f) in its appropriate context as an essential component of the public financing scheme and accorded no deference to congressional judgment. In light of the important interests served by the invalidated provision and the novel constitutional issues involved, this case warrants plenary consideration by this Court to reverse the decision below.

A. The Provision at Issue is a Necessary Part of the Public Financing Scheme

The Fund Act is the product of more than a decade of Congressional research and legislative hearings

aimed at bringing meaningful reform to the area of financing presidential election campaigns.[9] In providing for the public financing of presidential general elections, Congress sought to build public confidence in the electoral process; to strengthen the responsiveness of elected officials to voters; to eliminate the pressure, influence and corruption of private campaign funds; to assure fairness and equality of opportunity to all candidates; to revitalize our political system by establishing an alternate means of campaign financing; to insure against repetition of Watergate-type scandals; to eliminate the influence of large contributors; to eliminate the impression that a candidate can "buy" an election; and to provide candidates an alternative to the rigors of fundraising and private financing, freeing them to spend

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[9] Although public funding first became available in the 1976 elections, the need for reform measures to minimize the deleterious effects of aggregated wealth spent on behalf of presidential candidates had been the source of extensive congressional debate since 1948. 117 Cong. Rec. 41,747 (1971). Public financing for presidential general election campaigns was enacted in the Presidential Election Campaign Fund Act of 1966. In 1967, however, Congress concluded that the 1966 Act should be suspended pending the adoption of guidelines governing the distribution of money from the fund. Pub. L. No. 90-26, 81 Stat. 41 (1967); *see* 117 Cong. Rec. 41,746 (1971). A refined version of the Presidential Election Campaign Fund Act was introduced and later enacted as part of the Revenue Act of 1971. Pub. L. No. 92-178, 85 Stat. 573 (1971). Final Congressional resolution of the form of the statutory scheme came in 1974, when automatic appropriations to the fund and the amount of the entitlement were established, and when the Commission was given the responsibility for administration of the fund. Pub. L. No. 93-443, §§ 403-405, 88 Stat. 1263 (1974). In 1976, Congress amended the Fund Act to its present form. Pub. L. No. 94-283, §§ 301-304, 90 Stat. 475 (1976).

more time addressing the issues.[10] Congress clearly intended "to make a major change that would be a tremendous improvement toward lifting the office of the presidency above the power of private money to control it." 117 Cong. Rec. 41,947 (1971) (remarks of Sen. Long). Senator Pastore, the Fund Act's sponsor, aptly expressed Congress's goal of eliminating the political *quid pro quos* that may arise out of financing presidential campaigns through private funds:

> Let's be done with it. Let the President be a free and independent man. Let him not be beholden to anyone.

119 Cong. Rec. 38,900 (1973).

To achieve these objectives, Congress enacted a scheme providing for full public financing of the general election campaigns of major party presidential nominees. Congress repeatedly emphasized, however, that public financing was intended to serve as an "alternative" to, as opposed to a supplement

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[10] *See* S. Rep. No. 93-1239, 93d Cong., 2d Sess. 3-4 (1974); Hearings on S.382 Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 92d Cong., 1st Sess. 78 (1971); Hearings on S.1103, S.1954 and S.2417 Before the Senate Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 93d Cong., 1st Sess. 70, 207 (1973); 120 Cong. Rec. 10,546 (1974) (remarks of Sen. Hart); 119 Cong. Rec. 38,900 (1973) (remarks of Sen. Pastore); 117 Cong. Rec. 41,777-81 (remarks of Sens. Kennedy, Cranston, Eagleton, and Hart). *See also Buckley* v. *Valeo*, 424 U.S. at 91; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 285 (S.D.N.Y. 1980), *aff'd* 616 F.2d 1 (2d Cir. 1980) (en banc) (per curiam), *aff'd mem.* 445 U.S. 955 (1980).

to, private financing.[11] In order to protect public financing from becoming a mere subsidy, Congress enacted a comprehensive plan to govern presidential election campaign finance, carefully examining each such provision in the context of the overall statutory scheme.

At the heart of this plan lie the eligibility requirements and expenditure limitations. In order to become an "eligible candidate" the candidate must certify that he or she: has not and will not accept any private contributions; will adhere to an expenditure limitation; will maintain and furnish to the Commission, when requested, materials pertaining to the candidate's qualified campaign expenses; will submit to an audit and examination by the Commission after the election; and will make whatever repayments are required by the Commission. 26 U.S.C. §§ 9002(4) and 9003. The candidate must also be the presidential nominee of a major party, as defined in 26 U.S.C. § 9002(6).[12] If these conditions are satisfied, and if the candidate so chooses, the candidate will receive $20,000,000 plus an adjustment for inflation, to defray all general election campaign expenses. 26 U.S.C. § 9004(a)(1).[13]

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[11] *See, e.g.*, S. Rep. No. 92-553, 92d Cong., 1st Sess. 56 (1971), 117 Cong. Rec. 41,762 (1971) (remarks of Sen. Pastore).

[12] A candidate of a minor or new party, as defined by 26 U.S.C. § 9002(7) and (8), may establish eligibility to receive public funding in an amount which bears the same ratio to the amount paid to a major party as the number of votes cast for that minor/new party in the last election (or, if the party did not participate in that election, the present election) bears to the average number of popular votes received by the major party candidates for President in the preceding presidential election. 26 U.S.C. § 9004(a)(2) and (3).

[13] The amount for 1980 was $29,440,000. *See* 2 U.S.C. § 441a(b)(1)(B) and (C).

Candidates who opt to receive public funds may not incur qualified campaign expenses in excess of the amount of public monies received under the Fund Act. 26 U.S.C. §§ 9003(b)(1), 9004(a)(1), 9007 (b) and 9012(a); 2 U.S.C. § 441a(b)(1)(B). Publicly financed candidates are also prohibited from accepting any form of private financing to augment the public monies received and spent on behalf of their campaigns other than to compensate for deficiencies in the fund. 26 U.S.C. §§ 9003(b)(2), 9007(b)(3), and 9012(b)(1). Individuals and political committees are similarly prohibited from making money or in-kind contributions. 26 U.S.C. § 9012(b). The foregoing restrictions were upheld by this Court in *Republican National Committee* v. *Federal Election Commission*, *supra*, in which the Court affirmed the three-judge district court's conclusion that, "the public interest purposes behind the decision of Congress to provide for the financing of presidential elections would hardly be served unless some reasonable limits and conditions were imposed." 487 F. Supp. at 285, *aff'd mem.* 445 U.S. 955 (1980).

Similarly, in enacting 26 U.S.C. § 9012(f), the provision in question, Congress determined that the public financing scheme required a limitation on the amount which unauthorized political committees could spend to further the election of publicly funded candidates. In proposing his amendment to permit committee expenditures up to $1,000 per candidate, Senator Taft stated that the purpose of § 9012(f) "is to prevent any political committees from being formed as a subterfuge so that they can go beyond the authorization of the committees and make expenditures that were not within the limitations of the expenditures which are in the bill." 117 Cong. Rec. 42,397 (1971). And as Senator Hart observed: "This

provision ensures, of course, that the public fund will not just be [a] base for ever-increasing campaign spending." 117 Cong. Rec. 41,780 (1971). *See also* 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Hart) (". . . this language is necessary purely to accomplish the purpose of this bill."); 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Cranston) ("The amendment could painfully, at long last, liberate American political parties from financial dependence on big money, big pressure groups and big spenders of all kinds . . .").

Section 9012(f) was thus rooted in Congress's wise, indeed expert, assessment of the potential danger in allowing political professionals to amass, control and spend vast sums to secure the election of presidential candidates. As this Court has acknowledged, the risk that presidential candidates may become, or even appear to be, beholden to these private benefactors is the precise evil which the Fund Act sought to eradicate. *Buckley* v. *Valeo*, 424 U.S. at 91, 96; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 284, *aff'd mem.* 445 U.S. 955 (1980). Moreover, Congress recognized that § 9012 (f) must apply to those committees functioning "independently" from the candidate's official campaign.[14] The danger that vast "independent" expenditures will create "implicit obligations", or the appearance of such obligations, to those who control these expenditures is particularly great in the context of a publicly funded campaign, where the candidate must adhere to an expenditure limitation and may not accept private contributions to supplement public funds received. Presidential election campaigns are, moreover, highly visible; no prior consultation or coordi-

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[14] *See* H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 5 (1976).

nation with the candidate's campaign is required to apprise anyone as to how best to assist the candidate. Indeed, as this Court observed in *Buckley* v. *Valeo*, *supra*, to conclude otherwise would "naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence. . . ." 424 U.S. at 45.[15]

Having concluded that some limit on expenditures by unauthorized committees was necessary to preserve the integrity of the public financing system, Congress determined that a limitation of $1,000 would best serve this purpose. Well aware of the high cost of federal campaigns, Congress acknowledged that "when you incur an expense to promote the candidacy of a presidential candidate, $1,000 is small." 117 Cong. Rec. 42,399 (1971) (remarks of Sen. Pastore). Nevertheless, Congress concluded that the $1,000 limit was essential to vitiate the influence of aggregated wealth in presidential campaigns and to prevent circumvention of the expenditure limitations. The choice of that figure is clearly a permissible legislative judgment. As this Court concluded nearly fifty years ago:

> The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of the means to that end presents a question primarily addressed to the judgment of Congress.

Burroughs & Cannon v. *United States*, 290 U.S. 534, 547 (1934); *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting). *See also*

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[15] *See also United States* v. *United Automobile Workers*, 352 U.S. 562, 570-84 (1957).

Marchioro v. *Chaney*, 442 U.S. 191 (1979); *Buckley* v. *Valeo*, 424 U.S. at 13 n.16.[16]

The lessons of the last two presidential election cycles indicate that Congress' judgment reflected farsighted wisdom. Spending by unauthorized political committees on behalf of presidential candidates has increased dramatically during the past four years.[17] Absent § 9012(f), such spending will continue to rise, bringing with it the very cloud of suspicion over the Presidency that the Fund Act was designed to dispel. Indeed, this Court has held that the Fund Act, insofar as it eliminates even the appearance of corruption, promotes a compelling governmental interest. *Buckley* v. *Valeo*, 424 U.S. at 91, 95; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 285, *aff'd mem.* 445 U.S. 955 (1980); *see* discussion, *infra* at 26-29.

B. 26 U.S.C. § 9012(f) is Consistent with First Amendment Freedoms of Speech and Association

The Fund Act and FECA are specifically structured to permit individuals, both directly and through political party associations, to contribute and spend substantial amounts on behalf of the candidates they support.[18] *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 286, *aff'd*

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[16] A conclusion that the $1,000 ceiling is too low, imposing an undue burden on first amendment rights, does not require that the concept of § 9012(f) be held facially unconstitutional. While this Court concluded that the $10 and $100 threshold reporting requirements in FECA were "indeed low," the Court sustained the provisions since the line drawn was "necessarily a judgmental decision, best left in the context of this complex legislation to the congressional discretion." *Buckley* v. *Valeo*, 424 U.S. at 83.

[17] See discussion, *infra* at note 37.

[18] *See* 2 U.S.C. § 441a.

mem. 445 U.S. 955 (1980). Indeed, the public financing scheme was carefully designed by Congress "to meet all major constitutional, practical, and political objections," 117 Cong. Rec. 41,777 (1971) (remarks of Sen. Kennedy), and to "further . . . first amendment values." *Buckley* v. *Valeo*, 424 U.S. at 93. Section § 9012(f) is a narrowly drawn provision of this integrated scheme, limited by its terms to expenditures made by unauthorized political committees to defray the qualified campaign expenses of publicly financed presidential candidates. Congress determined that by enacting § 9012(f) it would not "straightjacket organizations that have a legal right . . . to express their personal opinion." 117 Cong. Rec. 42,399 (1971) (remarks of Sen. Pastore).

This Court, in holding the limits on campaign contributions constitutional, has recognized the attenuated relationship between contributions to political committees and the contributors' interests in speech and association. In so holding, this Court stressed the availability of a wide range of ways for individuals to express their support for federal candidates. *Buckley* v. *Valeo*, 424 U.S. at 20-22; *see also Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 286, *aff'd mem.* 445 U.S. 955 (1980) (prohibitions on contributions "imposed by [the Fund Act] do not abridge the rights of supporters"). Moreover, in evaluating allegations of first amendment infringement when set against legitimate public interests, the Court has looked to the availability of alternative means of communication. *See, e.g., Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85, 93 (1977); *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973).

Similarly, § 9012(f) does not impinge directly on political expression and association by individuals,

and implicates the first amendment only in a very limited fashion.[19] While individuals cannot contribute directly to a publicly financed candidate, the Fund Act and FECA provide other significant avenues of political expression. *Buckley* v. *Valeo*, 424 U.S. at 28. Every individual, through the voluntary check-off provision, has an equal opportunity to contribute to the fund to be used by presidential candidates. In addition, individuals are permitted to make unlimited expenditures on behalf of any presidential candidate. *See* 2 U.S.C. § 431(9) and (17). *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 286, *aff'd mem.* 445 U.S. 955 (1980). Individuals are free to volunteer their services on behalf of any presidential candidates or political committee and to associate with and work for the candidate's political party. 2 U.S.C. § 431(8)(B)(i). *See Buckley* v. *Valeo*, 424 U.S. at 22, 28, 48 n.54, *citing Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 579; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 286, *aff'd. mem.* 445 U.S. 955 (1980). Individuals may use

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[19] Indeed, section 9012(f) further exempts from its provisions expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions (26 U.S.C. § 9012(f)(2)(A) and expenditures made by nonprofit (26 U.S.C. § 501(c)) organizations in communicating to their respective members the views of those organizations. (26 U.S.C. § 9012(f)(2)(B)). Thus, 26 U.S.C. § 9012(f), by merely permitting non-party political committee expenditures up to $1,000 in support of a candidate who has chosen public funding, only minimally infringes on the first amendment, and intrudes upon rights of association only in an indirect manner. *Cf. California Medical Association* v. *Federal Election Commission, supra*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 at 50,992 (9th Cir. May 23, 1980), *possible jurisdiction postponed*, No. 79-1952 (Oct. 6, 1980).

their real or personal property and provide invitations, food and beverages up to $1,000 in an election, 2 U.S.C. § 431(8)(B)(ii), and may spend an additional $1,000 on personal travel on behalf of a candidate. 2 U.S.C. § 431(8)(B)(iv).[20]

Individuals may also contribute up to $20,000 a year to a national political party which in turn may make expenditures, in connection with the general election campaign, of up to two cents for each member of the voting age public—an amount of $4,637,653.76 in 1980—on behalf of the party's presidential candidates. 2 U.S.C. § 441a(d)(2), formerly 18 U.S.C. § 608(f); *see Buckley* v. *Valeo*, 424 U.S. at 49 n.67. Moreover, individuals may freely associate with and contribute to state and local party committees which in turn may defray the costs of such grass-roots activities as voter registration and get-out-the-vote drives on behalf of the party's presidential and vice presidential candidates. 2 U.S.C. § 431(8)(B)(xii). Individuals may also contribute to a multi-candidate political committee which may in turn spend up to $1,000 to defray qualified campaign

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[20] Section 9012(f) does not limit an individual's ability to give or spend money to promote issues and to help issue-oriented groups. *See United States* v. *National Committee for Impeachment*, 469 F.2d 1135, 1139-42 (2d Cir. 1972); and *American Civil Liberties Union* v. *Jennings*, 366 F. Supp. 1041, 1055-57 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *ACLU*, 422 U.S. 1030 (1975). *See also Buckley* v. *Valeo*, 424 U.S. at 79 n.106. Indeed, section 9012(f) effectively makes the same distinction between expenditures made to support publicly financed presidential candidates and other political activity as do the Hatch Act restrictions upheld in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 99-100 (1947) and *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 556.

expenses of each publicly financed candidate.[21] 2 § 441a(a)(1), 26 U.S.C. § 9012(f).

Further, the statutory definition of political committee does not necessitate a determination that individuals who wish to make independent expenditures as an informal group may not make such expenditures.[22] Indeed, the Commission, authorized to "administer, seek compliance with, and formulate policy with respect to" the Fund Act, has never decided that an informal group, in which individuals retain control over their funds, would be considered a political committee. Therefore, individuals are free to associate in an informal group and may well make independent expenditures to amplify their voices in support of a publicly financed candidate without qualifying as a political committee.

Appellee multi-candidate political committees are not groups of individuals, as envisioned by the lower court, who merely desire a "professional touch" to amplify their "small voices." App. A. at 19a, 22a.[23] Individuals contributing to these political committees

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[21] The drafters of the Fund Act understood that "by allowing unauthorized committees to spend up to $1,000 for their [Presidential] candidates, the [Fund Act] avoids the First Amendment objections that might be raised against any complete prohibition of private spending." 117 Cong. Rec. 41,777 (1971) (remarks of Sen. Kennedy).

[22] 26 U.S.C. § 9002(9) defines "political committee" as "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office."

[23] In upholding the $5,000 contribution limitation, the ninth circuit viewed multi-candidate political committees as "natural targets for candidate influence." *California Medical Association* v. *Federal Election Commission, supra* at 50,991.

have no voice in any decision regarding contributions made to federal candidates. Indeed, an individual could not ensure that funds donated for use in connection with the presidential campaign would be used for that purpose. Since the political committees could not accept earmarked contributions for use in presidential campaigns,[24] and since the appellees are multicandidate committees which, by definition, contribute to more than one federal candidate, it is possible that funds given to benefit the presidential campaign effort were expended on behalf of a congressional candidate.[25] Therefore, since the contributions were transformed into speech by someone other than the contributor, any limit on expenditures by the political committee on behalf of presidential candidates only indirectly infringes on the individual's first amendment rights. Moreover, the associational rights guaranteed by the first amendment are adequately protected by the myriad avenues of expression through political committees which FECA and the Fund Act promote.[26] *Buckley* v. *Valeo*, 424 U.S. at 21. The district court's holding to the contrary is clear error.

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[24] *See Buckley* v. *Valeo*, 424 U.S. at 34 n.40.

[25] *See* note 35, *infra*.

[26] However, while it is "well established that association . . . [is a] form of political expression protected under the First Amendment, . . . these activities are not protected absolutely and may be subject to governmental regulation where there is an overriding state interest in such regulation." *Bread Political Action Committee* v. *Federal Election Commission*, No. 80-1146, slip op. at 9 (7th Cir. Dec. 5, 1980) (en banc) (citations omitted). *See* discussion, *infra* at 26.

II. THE DECISION OF THE DISTRICT COURT CONFLICTS WITH *BUCKLEY* v. *VALEO* AND *REPUBLICAN NATIONAL COMMITTEE* v. *FEDERAL ELECTION COMMISSION*

The decision below cannot be reconciled with controlling authority in this Court or the decisions of other Circuits. This Court has upheld the validity of expenditure limitations in the context of public financing on three occasions and delineated a clear distinction between a person spending money directly for speech and giving money to a political committee to be spent for speech.[27] By finding that the limitation of § 9012(f) violates the first amendment rights of contributors to appellee political committees, the court below reached a decision incompatible with this Court's rulings in *Buckley* v. *Valeo*, *supra* and *Republican National Committee* v. *Federal Election Commission*, *supra*.

A. The District Court Misapplied *Buckley* v. *Valeo*

In *Buckley*, this Court reviewed challenges to the constitutionality of various provisions of the Federal Election Campaign Act and of the Presidential Election Campaign Fund Act. As to the challenges to the Fund Act, this Court found no merit in claims that the challenged provisions of the Fund Act violate either the First or the Fifth Amendment. *Buckley* v. *Valeo*, 424 U.S. at 86.[28] In its review of the expendi-

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[27] This Court upheld the constitutionality of the Fund Act in *Republican National Committee* v. *Federal Election Commission*, *supra*. *See also California Medical Association* v. *Federal Election Commission*, *supra*; *Mott* v. *Federal Election Commission*, 494 F.Supp. 131, 137 (D.D.C. 1980), *appeal docketed*, No. 80-1949 (D.C. Cir. Aug. 12, 1980), No. 80-2069 (D.C. Cir. Sept. 4, 1980) (distinction drawn between direct and indirect expression).

[28] 26 U.S.C. § 9012(f) itself was not challenged in *Buckley* v. *Valeo*, *supra*, and the Court rejected as unripe challenges

ture limitations, the Court found that FECA's "expenditure ceilings impose direct and substantial restraints on the quantity of political speech." 424 U.S. at 39. Thus the Court found that 18 U.S.C. § 608 (e)(1) (limitation on spending by individuals and groups "relative to a clearly identified candidate"), § 608(a) (limitation on spending by candidates), and § 608(c) (limitation on spending by campaigns), did not serve the "substantial governmental interest in stemming the reality or appearance of corruption in the electoral process." 424 U.S. at 48.[29] However, the Court upheld all challenged expenditure limitations in the context of publicly financed campaigns.

Preliminarily, the Court found that "public financing of Presidential elections as a means to reform the electoral process" was a legitimate choice made by Congress pursuant to its power to legislate for the "general welfare". United States Constitution, art. I, § 8, cl. 2; *Buckley* v. *Valeo*, 424 U.S. at 90. Therefore, the Court upheld Congress's choice of prior election vote totals to determine eligibility for pre-election funding to major party candidates and to limit new party candidates to post-election funds. 424 U.S. at 97. The Court noted:

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to other subsections of 26 U.S.C. § 9012. *See*, Answers to Certified Questions, 424 U.S. at 143 n.178, *aff'g* 519 F. 2d at 898-900.

[29] The Court narrowly construed § 608(e)(1) to apply only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office" in order "to preserve the provision against invalidation on vagueness grounds." *Buckley* v. *Valeo*, 424 U.S. at 44. As narrowly construed, the Court then found that the provision was inadequate to serve "the governmental interest in preventing corruption" because it "prevents only some large expenditures." 424 U.S. at 45.

> Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political affairs. We cannot say that Congress' choice falls without the permissible range.

424 U.S. at 104.[30]

Moreover, the Court specifically held that its "holdings invalidating 18 U.S.C. § 608(a), (c), and (e)(1)" did not require "the conclusion that [public financing of presidential campaigns] is unconstitutional." Recognizing that "the expenditure limitations accepted by a candidate to be eligible for public funding are identical to the limits in § 608(c)," the Court had "no difficulty in concluding" that the public financing provisions were severable. *Buckley* v. *Valeo*, 424 U.S. at 108. The analysis of *Buckley* supports the constitutionality of 26 U.S.C. § 9012(f). The Court's holding that a generally applicable expenditure limit does not meet the demands of the First Amendment does not require a conclusion that the expenditure limitation of § 9012(f) is in the same manner unconstitutional. Just as *Buckley* let stand other expenditure limitations in the context of public financing, the *Buckley* analysis would uphold § 9012(f). The district court's holding to the contrary conflicts with this Court's holding in *Buckley* v. *Valeo*, *supra*, and must be reversed.

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[30] The Court similarly upheld the 10-state requirement for eligibility for presidential public funding, *Buckley* v. *Valeo*, 424 U.S. at 104 n. 140; public funding of party conventions, 424 U.S. at 104, and primary election campaign financing, 424 U.S. at 105. *See also Gelman* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 at 51,021 n. 13 (D.C. Cir. July 18, 1980), *cert. denied* —— U.S. ——, 49 U.S.L.W. 3227 (Oct. 6, 1980).

Moreover, the district court (using the words "contribution" and "expenditure" as talismans for constitutional sufficiency) found that the "case before this court is an 'expenditure' case because it is precisely the speech of individual *contributors* which is hampered by the statutory restriction" and concluded that § 9012(f) "fails to survive the strict scrutiny required by the First Amendment." App.A at 17a, 27a (emphasis added). The court's holding disregarded § 9012(f)'s important function within Congress's public financing design (*see* discussion, *supra* at 8) and misapplied the *Buckley* rationale to the Court's mistaken view of the facts of this case. Thus, the court found that appellee political committees are "simply 'pooling agents' for many small voices [31] wishing to make intelligible political statements" and that "[t]he money expended by the committees pays for political communications which speak the language of their members and contributors." App. A at 17a. The district panel did not and could not identify any factual example of the agent-principle relationships it claimed existed between appellee political committees and their contributors.

Indeed, even a cursory review of the record indicates that there exists between AEP, AFC, and FCM and its contributors the type of political committee-contributor relationship envisioned by this court in *Buckley*, 424 U.S. at 21-22. AFC, AEP and FCM are political committees within the definitions at 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AFC and

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[31] During the last quarter of the 1980 election year cycle, FEC records indicate that the "small voices" to which the court referred made an average itemized contribution of at least $1,120 to AEP, $700 to FCM and $750 to AFC. By comparison, the average itemized contribution to the Anderson for President general election campaign fund was $180.

FCM have each qualified as multi-candidate political committees.[32] Appellee committees indicate that they are ongoing entities and will operate not simply as groups of individuals making "independent" expenditures on behalf of a single candidate during the 1980 election cycle. FCM, for example, has been in existence since 1972. Moreover, contrary to the view of the district court, contributors to appellee committees do not exercise any control over the committees' policy or management other than in a highly indirect manner by refusing to contribute.[33] Such a role for the contributor is consistent with the conclusion of this Court in *Buckley* that contributions are symbolic expressions which might be transformed into speech by someone other than the contributor. *Buckley* v. *Valeo*, 424 U.S. at 21-22.

Moreover, contrary to the view of the district court, contributors to appellee political committees can receive no assurance that their contributions will even be used for expenditures on behalf of a presidential candidate. As noted, *supra*, appellee political committees are or will soon become multi-candidate political committees which make contributions to House and Senate candidates. *See* 2 U.S.C. § 441a(a)(4).

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[32] *See* discussion, *supra* at 4.

[33] The lower court found that "[t]he communication sponsored by the political committees [presumably AFC, AEP, FCM] is the language of their members and contributors because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees." App. A at 18a. The court went on, however, to point out that "[t]he contributors do have power over the speech disseminated by the political committees. . . . If a committee disappoints its membership, contributions will dry up." *Id.* Commission records disclose that over 90% of the contributions to AFC and AEP are from one-time contributors.

Indeed, Commission records reveal that all of the political committees in question have made contributions to such federal candidates. Clearly, the district court erred when it found that "money expended by the committees pays for political communications which speak the language of their members and contributors." App. A at 17a.[34]

The court below, misperceiving the true nature and make-up of appellee political committees, has misconstrued this Court's analysis in *Buckley* regarding contributions and expenditures. The judgment of the court below is in clear error and accordingly must be reversed.

B. The District Court Misapplied *Republican National Committee* v. *Federal Election Commission* When It Concluded that 26 U.S.C. § 9012(f) Does Not Further a Compelling Governmental Interest in Eliminating Corruption

This Court in *Buckley*, *supra*, found that "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Buckley* v. *Valeo*, 424 U.S. at 96. Moreover, this Court affirmed the finding of the United States Court of Appeals for the Second Circuit (en banc) and the three-judge court convened pursuant to 26 U.S.C. § 9011(b) that public financing of presidential

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[34] For example, AFC indicated in its 30 day post general election report that it made over $17,000 in contributions to 17 federal candidates, that it had a cash-on-hand balance of $54,301.21 and outstanding debts totaling $50,982. Similarly, during the period 7/1/80-11/24/80 AEP made $14,000 in contributions to 14 federal candidates, had a cash-on-hand balance of $47,502 with no outstanding debts. During the same period, FCM made approximately $66,000 in contributions to 60 federal candidates, had a cash-on-hand balance of $48,781 and outstanding debts of $183,394.

campaigns does not violate the first amendment rights of either the candidates or their supporters. *Republican National Committee* v. *Federal Election Commission, supra.*

The district court nevertheless held that the $1,000 expenditure limitation contained in section 9012(f) fails to serve the compelling interest in eliminating corruption. The lower court's analysis in this regard overlooked both the true source of possible corruption in a publicly financed campaign and the role which expenditures have come to play in presidential elections, misapplying *Republican National Committee* v. *Federal Election Commission, supra.*

The real possibility of a *quid pro quo* arises not from the "small voices" of contributors but from those limited number of political committee decision-makers who determine where and when each committee's resources will be allocated.[35] The district

[35] Indeed, John Bailey of Bailey, Deardourf and Associates, AEP's advertising/media consultant, has observed that "the people who wield the authority out of private fundraisers are . . . the people who raise the money. . . . [T]he guy who can raise $50,000 in contributions is the guy who is incredibly important to that campaign and therefore has significant power." *See Republican National Committee* v. *Federal Election Commission, supra,* Joint Appendix at 1525a-26a. Recent statements of Terry Dolan, Chairman of the National Conservative Political Action Committee, whose committee made over $1.5 million in unauthorized expenditures on behalf of Ronald Reagan, illustrate the potential use of power by such individuals:

> Ronald Reagan is going to be President for 4 years, and it would be awfully nice to have as many conservative leaders in as many positions of responsibility as possible.

ABC World News Tonight, November 5, 1980. It was further reported that Mr. Dolan "was claiming scalps and warning that even President-elect Reagan had better mind his conservative P's and Q's." Mr. Dolan responded that Mr. Reagan had a "political obligation" to follow a conservative

court, by focusing on the possible corrupting influence of "small voices", completely overlooked a more important concern: the deleterious effect of large expenditures made by certain individuals on behalf of publicly financed presidential candidates with a $29.4 million expenditure limit.

This Court in *Buckley* presciently recognized the potentially deleterious effect of large "independent" campaigns, such as those conducted by appellee political committees when it noted that:

> the independent advocacy restricted by the provisions *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.

Buckley v. *Valeo*, 424 U.S. at 46 [36] (emphasis added). And in *Republican National Committee* v. *Federal Election Commission*, *supra*, the court recognized that:

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stance or "if he [didn't] . . . he [would] pay the political price" for his failure. CBS Evening News, November 5, 1980. *See Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 284, *aff'd mem.* 445 U.S. 955 (1980).

[36] This Court's opinion was written in January 1976. In the four years since that decision, the assessment of the role of independent expenditures has drastically changed from "independent expenditures [may become] one of the most important elements in a changing political process," (An Analysis of the Impact of the Federal Election Campaign Act, 1972-78, Final Report to the Committee on House Administration by the Campaign Finance Study Group, The Institute of Politics, Harvard University (May 1979) at 5-12), to "the issue of this big money casting a dark cloud over the integrity of the American political system will become a great issue and the American people will demand a stop to it." (News Comments of Vice President Walter E. Mondale—St. Paul, Minnesota—November 5, 1980).

Congress' power to enact the very statutes here under attack was recognized by the Supreme Court in *Buckley* v. *Valeo*, 424 U.S. 1, 57 n.65 (1976), where the Court stated:

> "Congress may engage in public financing of election campaigns and *may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.* Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding." (Emphasis added.) (citation omitted.)

487 F. Supp. at 284, *aff'd mem.* 445 U.S. 955 (1980); and that, acceptance of public financing being voluntary,

> the supporters may not complain that the government has deprived them of the right to contribute. . . As in *Marchioro* v. *Chaney*, 442 U.S. 191, 99 S.Ct. 2243, 2248, 60 L. Ed. 816 (1979), the complaint of the contributors should be addressed to the candidate who has chosen to forego private financing, rather than to the court.

487 F. Supp. at 286, *aff'd mem.* 445 U.S. 955 (1980).

The district court's rejection of 26 U.S.C. § 9012 (f) as a constitutionally sufficient means for Congress to attain the goal of corruption-free publicly funded presidential campaigns is a rejection of *Republican National Committee* v. *Federal Election Commission, supra.* Section 9012(f) is necessary for the legitimate congressional purpose affirmed by this Court.[37]

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[37] Preliminary Commisison figures indicate that at least $11 million in unauthorized committee expenditures were made on behalf of the Republican presidential candidates in the general election through November 24, 1980. In contrast,

CONCLUSION

Based on the foregoing arguments and authorities, appellant respectfully requests that this Court note jurisdiction in this appeal, receive full briefs on the merits and hear oral argument in order to resolve the substantial questions presented by this case.

Respectfully submitted,

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DECEMBER 29, 1980

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for 1975-76, $1,646,540 in unauthorized committee expenditures were spent for or against Presidential candidates. Should this trend toward increased spending on behalf of presidential candidates continue, the congressional purpose behind the enactment of public financing—to limit big money and its influence—will be destroyed. If the expenditure limits of § 9012(f) are erased, expenditures by political committees will become an additional and significant source of funds for publicly financed candidates, and a vehicle to circumvent the Fund Act's expenditure limitations. *See California Medical Association* v. *Federal Election Commission, supra* at 50,990. Indeed, this Court upheld public financing against the fifth amendment challenge of minor party candidates on the basis that the expenditure limitations and the ban on private contributions included in the public financing scheme would enhance minor party candidates' access to potential sources for private contributions. *Buckley* v. *Valeo*, 424 U.S. at 94-96. Section 9012(f) would appear to serve the same purpose.

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Consolidated)

Three-Judge Court

COMMON CAUSE, ET AL., PLAINTIFFS

v.

HARRISON SCHMITT, ET AL., DEFENDANTS

FEDERAL ELECTION COMMISSION, INTERVENOR

CA 80-1754

Three-Judge Court

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

Case heard before *Circuit Judges* TAMM and WILKEY, and *District Judge* PENN, Three-Judge District Court.

Opinion filed for the court by *Circuit Judge* WILKEY.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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AMERICANS FOR CHANGE, ET AL., DEFENDANTS

OPINION

WILKEY, *Circuit Judge*:

The Federal Election Commission ("FEC"), and Common Cause, a public interest organization, sued in two separate actions various groups of Ronald Reagan supporters who plan to spend monies to promote his chances in the 1980 presidential election. Both plaintiffs alleged that the plain language of

section 9012(f) of the Presidential Election Campaign Fund Act ("Fund Act")[1] prohibits the defendants' proposed expenditures which will exceed $1,000 to further the election of Ronald Reagan. As the Republican candidate for President, Mr. Reagan is entitled under the Fund Act to receive, and has already accepted, almost $30 million in public campaign funding. Pursuant to 26 U.S.C. section 9011 (b) this three-judge district court was convened with jurisdiction to "implement or construe" the Fund Act. The statute further directs the court to act as quickly as practicable. On 19 August 1980 we heard oral argument on the scope and constitutionality of section 9012(f). On 28 August 1980 the court issued two expedited Orders granting, *inter alia*, summary judgment for the defendants in the FEC action, and dismissing the Common Cause action. In this Opinion we develop our reasoning for the two Orders of 28 August.

I. STATUTORY PROHIBITION AGAINST EXPENDITURES BY POLITICAL COMMITTEES

A. *Background*

The defendants in both actions are various organizations, as well as a few of their organizers, who are broadly soliciting contributions from individuals who favor Ronald Reagan for president. These organizations plan to use the money they collect—they hope to raise and spend millions of dollars —to hire professional media and political consultants and purchase advertising, *etc.* They intend these expenditures to yield an effective program to promul-

[1] 26 U.S.C. § 9001 *et seq.* (1976).

gate their political views before the November election. The defendant organizations have registered with the FEC as "political committees."[2] The defendants' literature and solicitation materials detail their support for Ronald Reagan and outline their intention to spend the sums collected to realize their collective aspirations for the presidential election.

B. *Statutory Basis Jurisdiction and Substantive Prohibition*

1. *Jurisdiction in a Three-Judge District Court*

The FEC is plainly authorized by section 9011(b)(1) of the Fund Act to seek a declaratory judgment "that section 9012(f) validly prohibits expenditures in excess of $1,000 such as defendants have indicated they intend to undertake."[3] The statute is set out

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[2] A "political committee" is

> any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

26 U.S.C. § 9002(9) (1976).

Under another statute, the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 433(a) (1976), any "political committee" that is not an authorized campaign committee must file a statement of organization with the FEC within 10 days after becoming a political committee within the meaning of 2 U.S.C. § 431(4). The definition of "political committee" within the FECA is roughly the same as the definition of that term in the Fund Act.

[3] Motion of FEC for Summary Judgment at 30.

in full in the margin.[4] The right of Common Cause to bring such an action, on the other hand, is equivocal. We will reserve all discussion of the Common Cause lawsuit until Parts IV and V below.[5]

The statute requires a three-judge district court to entertain actions to "implement or construe" the Fund Act. This action to test the scope and validity of section 9012(f) is within the jurisdiction of this

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[4] 26 U.S.C. § 9011(b) (1976) provides:

§ 9011. Judicial review

(b) Suits to implement chapter.—

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or contrue [*sic*, quoted here as "construe"] any provision of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance within the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

[5] Common Cause requested substantial discovery of defendants as well as injunctive relief, neither of which was integral to the FEC complaint. *See* Parts IV-V *infra*.

court to "implement or construe" provisions of the Act.

2. *Prohibition Against Expenditures by "Political Committees"*

The plain language of section 9012(f) proscribes categorically the defendants' planned expenditures. They, the defendant "political committees," plan "to incur expenditures" "in an aggregate amount exceeding $1,000" "to further the election" of presidential candidate Reagan. This program of expenditures is a criminal offense according to the statutory section which is entitled "Criminal penalties." In pertinent part it reads:

> §9012. Criminal penalties
>
> (f) Unauthorized expenditures and contributions.—
>
> (1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.
>
> * * * *
>
> (3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to

> such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

We understand section 9012(f)(1) to prohibit *all* expenditures over $1,000 by political committees including *"independent expenditures."* An independent expenditure is an expense incurred by a political committee free of any coordination with the official and authorized campaign committees of the candidate. We reject the limiting construction of section 9012 (f) offered by defendants Harrison H. Schmitt, Carl T. Curtis, and Americans For Change. They suggest that the provisions may be interpreted as prohibiting only coordinated expenditures which have been authorized or requested by a publicly funded presidential candidate.[6] Though this "saving" construction would neatly preserve the statutory proscription from constitutional infirmity under *Buckley* v. *Valeo*[7] the language of the section will not support this rescue.

The section's plain terms apply broadly to *all* expenditures and this is in contrast with another section, section 9002(11) of the Fund Act, where Congress did adopt limiting language of this kind. If the limiting construction were correct, that is, if the expenditure prohibition applied only to expenditures authorized or requested by the candidate, then the section's existing proviso that only such expenditures are prohibited as "would constitute qualified cam-

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[6] *See* Memorandum of Points and Authorities in Support of Motion to Dismiss of Defendants Harrison H. Schmitt, Carl T. Curtis and Americans For Change at 10-13.

[7] 424 U.S. 1, 46-47 & n. 53 (1976).

paign expenses if incurred by an authorized committee of [the] candidate[]" would be more or less superfluous. The prohibited coordinated, or non-independent, expenditures would then *all* be qualified campaign expenses [8] rendering the proviso unnecessary.

Also, another election law statute, 2 U.S.C. section 441a(a)(1)(A), already prohibits individuals, groups, and committees from making contributions in excess of $1,000. A "contribution," however, is defined, in 2 U.S.C. section 441a(a)(7)(B)(i), to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate. . . ." Hence we can only read the expenditure prohibition in section 9012(f) to mean what it says: *all expenditures* over $1,000 by political committees which further a presidential candidate's election are illegal. We are compelled then to determine the constitutionality of this expenditure limitation consistent with the First Amendment analysis conceived in *Buckley* v. *Valeo*.[9]

II. FIRST AMENDMENT ANALYSIS UNDER *BUCKLEY* v. *VALEO*

In *Buckley* v. *Valeo* [10] the Supreme Court held that the campaign expenditure ceilings imposed by Congress in the Federal Election Campaign Act of 1971 ("FECA")[11] were unconstitutional. The Court reasoned that a statutory restriction on amounts which

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[8] *See* 26 U.S.C. § 9002(11) (1976).

[9] 424 U.S. 1 (1976).

[10] *Id.* at 12-59.

[11] 2 U.S.C. § 431 *et seq.* (1976).

citizens, groups, or candidates could expend in a political campaign was an impermissible limitation of the freedoms of speech and association protected by the First Amendment. The watershed case controls the election law case before this court. Thus a discussion of *Buckley* is appropriate before beginning our own constitutional analysis of the severe expenditure ceiling imposed on political committees.

A. *Campaign Expenditures Are Speech*

The Supreme Court made quite clear in *Buckley* that the power of Congress to regulate federal election was well-established under the Constitution.[12] That power to regulate, however, is not unbounded; it must of course be exercised consistent with rights guaranteed by the Constitution.

Campaign activity is speech on the highest constitutional plane. "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " [13] Moreover, political expression in a campaign is associational activity also protected by the First Amendment. The Constitution guarantees the " 'freedom to association with others for the common advancement of political beliefs and ideas,' a freedom that encompasses '[t]he right to associate with the political party of one's choice.' " [14]

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[12] *Buckley* v. *Valeo*, 424 U.S. at 13.

[13] *Id.* at 14 (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957)).

[14] *Id.* at 15 (quoting *Kusper* v. *Pontikes*, 414 U.S. 51, 56, 57 (1973) (*quoted in Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975)).

"The First Amendment protects political association as well as political expression." *Buckley* v. *Valeo*, 424 U.S. at

The Supreme Court noticed in *Buckley* the reality that public communication is expensive. Free speech is costly. Television, radio, newspaper, buttons—the Court has acknowledged that "these expensive modes of communication [are] indispensable instruments of effective political speech." [15] A restriction on the amount which can be spent on political communication is a practical limitation on the political issues which can be addressed or answered in a campaign. It also limits the range of participants in the political debate, and the size of the audience.

B. *Level of Judicial Scrutiny*

It was strenuously argued to the Supreme Court in *Buckley* that *expenditures* in a campaign entailed primarily "conduct" and not "speech." The Court rejected this contention emphatically,[16] stating that "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." [17] "[T]he governmental interests advanced in

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15. The Court noted that the constitutional right of association was derived from the role of group association to advocate *effectively* public and private points of view. *Id.* (citing *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)).

[16] *Id.* at 19.

[17] *Id.* (citations omitted).

Unlike [*United States* v.] *O'Brien*, [391 U.S. 367 (1978) (draft-card burning case)] where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest

support of the Act [*i.e.*, FECA] involve 'suppressing communication.' The interests served by the Act include restricting the voices of people and interests groups who have money to spend and reducing the overall scope of federal election campaigns." [18] Following *Buckley*, then, it is plain that election laws regulating political expression require a demonstration of "compelling governmental interest" to withstand a constitutional challenge calling for "strict scrutiny" by the reviewing court.

C. *Compelling Governmental Interest*

The Supreme Court considered three governmental interests adduced to support the contribution and expenditure ceilings: to prevent corruption, or, the appearance of corruption; to mute the voices of affluent groups and persons; and, to put a "brake" on the ballooning cost of election campaigns.[19] Only the first

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in regulating the alleged "conduct" of giving or spending money [in a campaign] "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U.S., at 382.

Id. at 17.

Obviously Congress *intends*, albeit neutrally, to regulate the speech-potential of money contributions and expenditures through the election laws it enacts. The giving and spending of money is alluring to the candidate because of the speech-potential it provides to him or her, while to Congress that particular speech-potential also represents the enticement that could be the wedge of corruption, tainting the candidate and the election process. Thus Congress's regulatory intention with respect to campaign contributions and expenditures necessarily involves the regulation of speech.

[18] *Id.* at 17.

[19] *Id.* at 25-26.

interest, to squelch corruption, was held constitutionally sufficient to support the FECA's $1,000 contribution limitation—a limitation on speech. The Court was crystal-clear in stating that Congress had no valid power to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections. . ."; because, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." [20]

In short, the Court has indicated the prevention of corruption is the singular compelling governmental interest justifying the limit on maximum contributions to candidates. Congress has constitutional authority, the Court held, to ensure that the marketplace of ideas in an election is not recast as a marketplace of "influence."

D. *Constitutional Distinction Between Contributions and Expenditures*

The Court *did not accept* that even the compelling anticorruption governmental interest supported a limitation on *expenditures* in a campaign. The Court reasoned that limitations on *expenditures* were more restrictive of First Amendment rights than limitations on *contributions*, hence the congressional objective to protect the new contribution ceilings by closing the so-called loop-hole of "independent" expenditures was constitutionally insufficient.[21] Preventing corruption would justify the contribution ceilings but would not also justify expenditure ceilings that redress only tangentially the corruption problem (*i.e.*,

[20] *Id.* at 48-49.

[21] *Id.* at 44.

by "protecting" contribution limits from circumvention), yet severely impinge on free speech rights.[22] Controlling contributions, the Court believed, would exorcise *quid pro quo* from the political scene.[23] Impeding the opportunity for venal politician/contributor relationships was a constitutionally valid means of accomplishing the governmental interest in fighting corruption. Contribution ceilings preserve electoral integrity without directly impinging on the rights of individuals.[24] On the other hand, "the independent advocacy restricted by the [expenditure] provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." [25] For, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." [26]

The right of citizens and groups to make expenditures in a campaign poses, according to the Court, only the most attenuated danger of *quid pro quo*. Evidently, *spending* money can just not be equated with *giving* money as a source of possible corruption. The Court noted that the threat of corruption in political spending was mitigated to a large extent by coupling unlimited expenditures with a strict restriction on contributions (which the Court upheld). There was no evil in collecting small amounts from

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[22] *Id.* at 45.

[23] *Id.*

[24] *Id.* at 58.

[25] *Id.* at 46.

[26] *Id.* at 47.

myriad individual contributors and then translating those funds into political communication spreading the candidate's message.[27] Thus the Court struck down FECA's section 608(e)(1) which limited independent expenditures, saying, "[t]hese provisions place substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate."[28]

A final perspective on *Buckley's* requirement of unlimited expenditures[29] comes from the more recent explication of the election laws in the *Republican National Committee* v. *Federal Election Committee* trilogy.[30] These cases upheld public financing of presidential elections. Candidates, the constitutional rationale goes, are permitted to forgo their own right to private contributions and unlimited expenditures in exchange for (exclusive) financing from the

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[27] *See id.* at 56 & n.64 (quoting from Judge Tamm's separate opinion, concurring in part and dissenting in part, *Buckley* v. *Valeo*, 519 F.2d 821, 917 (D.C. Cir. 1975)).

[28] *Id.* at 58-59 (emphasis added).

[29] Pivotal to the Court's analysis of electoral integrity *vis à vis* independent expenditures was the statutory provision that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act." *Id.* at 46. The Court recognized that it was one thing for Congress to restrict expenditures free from the candidate's control, but quite another for Congress (validly) to limit sham, "independent" expenditures, which being in the candidate's effective control amounted to nothing more than masked contributions and could be regulated as such.

[30] 100 S.Ct. 1639 (1980), *aff'g summarily*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *and*, 616 F.2d 1 (2d Cir.) (*en banc*).

public coffers. This is a voluntary decision made by the candidate, presumably, because the candidate believes that his or her political communication is enhanced by public funding, even given the restrictions. The candidate's decision, however, cannot bind his or her supporters outside the official campaign. Public funding—and the election law after *Buckley*—leaves open to supporters a wide range of means to express their support and their politics. In fact, *Republican National Committee* public funding (*e.g.*, no private contributions, expenditure ceilings, *etc.*) are permissible only because the rights of supporters are left untouched. "Most important", reflected the court, is that "uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in *Buckley* v. *Valeo*." [81]

III. SECTION 9012(f) LIMITATIONS ON EXPENDITURES BY POLITICAL COMMITTEES INHIBITS FIRST AMENDMENT FREEDOMS

The foregoing discussion of *Buckley* indicates the dubious constitutional quality of election law ceilings limiting amounts which may be independently expended in a campaign. The *Republican National Committee* cases still reserve a highly protected status for *independent expenditures* even since the advent of (conditional) public funding for presidential candidates (who accept the terms). Now we turn to our

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[81] *Republican National Committee* v. *Federal Election Committee*, 487 F. Supp. 280, 286 (S.D.N.Y.) (three-judge court), *aff'd summarily*, 100 S.Ct. 1639 (1980) (citing *Buckley*, 424 U.S. at 39-51).

own constitutional analysis of section 9012(f)'s prohibition of independent expenditures by political committees in excess of $1,000. This analysis turns on two fundamental questions which will explore whether section 9012(f) is consistent with the First Amendment after *Buckley*: (1) Does the proposed spending by the defendant political committees constitute an "expenditure" question under *Buckley*?, and (2) Are political committees, under *Buckley*, entitled to the same First Amendment rights to make independent expenditures as individuals and "informal groups?" We answer both questions affirmatively and hold that section 9012(f) is facially unconstitutional.

A. *Political Committee Prohibition Is an Expenditure Limitation and Thereby Limits Speech*

Under *Buckley* and the *Republican National Committee* cases the right of individuals and groups (outside of official campaigns) to make independent expenditures is a constitutional pillar of the election laws. Supporters of candidates have rights separate from the candidates they favor, rights which cannot be alienated by the candidate's choice with regard to public funding.[32] There is no constitutional reason that the organization of individual supporters of a candidate into groups called "political committees" should impugn the distinct and separate rights of campaign outsiders to sponsor political speech. Independent expenditures are the principal—and protected—source of this sponsorship.

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[32] *See Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 285-86 (S.D.N.Y.) (three-judge court), *aff'd summarily*, 100 S.Ct. 1639 (1980).

1. *This is Not a "Contribution" Case*

Buckley indicated clearly that expenditure limitations jeopardize First Amendment rights more severely than do limitations on contributions.[33] Consequently, *Buckley* held that the governmental interest in cleansing the electoral process of possible corruption was not enough to validate restrictions on expenditures. A "contribution" case, on the other hand, is entitled to less-exacting judicial scrutiny because "the transformation of contributions into political debate involves speech by someone other than the contributor."[34] The case before this court is an "expenditure" case because it is precisely the speech of individual contributors which is hampered by the statutory restriction.

The defendant political committees are simply "pooling agents" for many small voices wishing to make intelligible political statements. The money expended by the committees pays for political communications which speak the language of their members and contributors. It is the speech of the contributors which is defrayed by the contributions. Earlier, we noted that political speech is expensive nowadays. It requires a lot of money and a lot of sophistication to yield effective communication in the political arena. Political committees pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message. A simple example explains the efficiency argument: One thousand politically motivated persons could each afford to buy a short classified advertisement in one thousand local newspapers; if, however,

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[33] *See* Part II. D. *supra.*

[34] *Buckley* v. *Valeo*, 424 U.S. at 21.

they join together, pool funds and integrate planning, they can purchase perhaps an advertisement in a national magazine, or a commercial on network television. There can be little doubt that an economy of scale enhances the informational impact of larger units of communication. Since it is beyond contention that individuals and "informal groups" may make unlimited independent expenditures to express their First Amendment rights, political committees may not be denied the same right merely because they are *efficient* groupings of like-minded individuals.

2. *Individuals Speak Through Political Committees*

The communication sponsored by the political committees is the language of their members and contributors because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees. The contributors do have power over the speech disseminated by the political committees. Political speech like this is possible in the first instance only because the contributors contribute to one particular committee or another. Contributors associate in a particular political committee because that committee will express their own thoughts, which benefit thereby from amplitude in numbers and professionalism. If a committee disappoints its membership, contributions will dry up.

To require that contributors to political committees literally draft their own television and other public messages is naive. These contributors express themselves through political committees—their First Amendment rights are not merely coextensive with their actual participation in drafting specific lan-

guage. The language drafted by the steering groups of the political committees reflects the political speech common to all of the member-contributors. That the language and format employed in the groups' public political communications have a professional touch does not make it any less the language of the individual contributor; one of the things he or she most wants is the professional touch to make his or her speech efficient and effective in the modern age. One thousand individuals have just as much right to join together to do this as one man or woman to do it alone. It emasculates the guaranteed right of association to disallow political committees from organizing and focusing the views of their adherents.[35] Thus the expenditures undertaken by the political committees represent an efficient exercise of First Amendment rights of associated individuals. This exercise warrants the highest protection under *Buckley* and *Republican National Committee.*

3. *Speech Emanating from Political Committees Is Different from a Candidate's Speech*

A word is in order to point out how speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the non-publicly funded candidate). A candidate strives to satisfy and mollify his or her supporters whenever possible; the politician, after all, depends considerably on pleasing supporters in order to maintain the campaign's momentum and coherence. Candidates are loosely tethered, not bound,

[35] *See* Part III. B. 2 *infra.*

to the notions of political speech held by their supporters. Political committees, on the other hand, are bound to reify the political thoughts of their member-contributors. The political communication by political committees is circumscribed by the expectations and understandings of the associates. The organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors. The candidate, however, is free to exercise his or her own judgment as to what is in his or her own best interest based on a broader constituency. (This explains the apprehension with which many candidates' organizations look on the activities of uncoordinated and uncontrollable independent committees, but this does not and cannot limit the right of these independent committees to make their contribution to the robust political debate in any way they and their associates choose.)

The above comparison highlights once again the factual reality, as well as constitutional reality following *Buckley* and *Republican National Committee*, that the rights of candidates and their supporters are distinct. In *Buckley*, the Court realized that candidates could be ambivalent toward the independent political forays of their supporters. The Court noted that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." [36] Individuals, by associating in political committees, can express viewpoints that complement the positions of the favored candidate, or, they can express viewpoints which seek to influence or prod the candidate and the public. That individuals,

[36] *Buckley* v. *Valeo*, 424 U.S. at 47.

through their political committees, hope for a candidate's election in no way means that their own speech is interchangeable with the candidate's. The Constitution entitles even mainstream individuals favoring mainstream candidates to communicate their separate, if sympathetic, views.

4. *Political Committees Cannot Wield the* Quid Pro Quo: *The Compelling Interest in Eliminating Corruption is Insufficient to Justify Section 9012(f)*

As elaborated in Part II above, the *Buckley* Court sustained FECA's contribution, though not expenditure, limits on the basis of the compelling governmental interest in protecting elections from the taint of corruption. The Court saw in contributions to candidates the real possibility of corrupting *quid pro quos*. Independent expenditures, the Court felt, could not pose the same *quid pro quo* problem.

Similarly, the anticorruption interest cannot support the prohibition against *independent* expenditures by political committees. Any attempted exaction of a *quid pro quo* by a political committee would of course totally eliminate the constitutional protection reserved under *Buckley* for expenditures that are *independent*. A *coordinated*, non-independent expenditure by a committee might harbor a *quid pro quo*, but no more so than an individual's expenditures might.[37] Coordinated expenditures, by individuals or

[37] In fact, the large-scale operation of a political committee, requiring registration with the FEC, would be less capable of keeping a *quid pro quo* secret than could a wealthy individual operating without the bright sunshine of public scrutiny.

committees, are treated like contributions;[38] such contributions to a publicly funded candidate are of course illegal, but are inapposite to the constitutional issue here under consideration.

It is difficult, then, to imagine how the thousands of "small voices" associated together in a political committee could compromise a candidate for President. The political committees are venting the political ideas and commitments of their members, not of the candidate. The candidate will no more be beholden to the political committees than Presidents typically are to those elements of their constituency who voted for them. It is individuals themselves, acting in association, who are addressing political issues through independent expenditures. This public comment may persuade, and thereby influence decisionmakers, but it is protected by the First Amendment.[39]

A further check does now exist, however, on the power of political committees to finance the views of their members: contributions to committees are restricted in amount by 2 U.S.C. section 441a(a)(C). An individual may give only up to $5,000 to a political committee. This particular contribution limitation was not addressed directly in *Buckley*, but might be constitutionally permissible according to the *Buckley* rationale, which upheld other such limits.[40] What all

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[38] *See* notes 7-9, 29 & accompanying text *supra*.

[39] *See Let's Help Florida* v. *McCrary*, 621 F.2d 195 (5th Cir. 1980).

[40] Contribution limits to political committees have been upheld in two recent cases. *See California Medical Association* v. *FEC*, No. 79-4426, slip op. (9th Cir. 23 May 1980); *Mott* v. *FEC*, No. 79-3375 (D.D.C. 30 June 1980). Congress could, perhaps, if these authorities are upheld, shrink reasonable limits on contributions as it might deem necessary to control

of this clearly indicates is that while political committees may have the power to express sympathy and agreement with candidates, neither they nor individual members have the power to control the candidates they favor.

B. *Political Committees Have First Amendment Rights Commensurate With Individuals' Rights*

In the preceding section we demonstrated that the prohibition of section 9012(f) raises an *expenditure* question under *Buckley*, thereby implicating highly protected free speech rights. We also showed how political committees simply pool funds and channel the joint speech of their members. We now turn to consider directly the closely related question: whether political committees, as multi-person organizations, have First Amendment rights so inferior to those of individuals that they fall out from the protective aegis of *Buckley*?

1. Buckley *Comprehends First Amendment Rights for Groups*

It is absolutely plain that free speech rights protected under *Buckley* extend beyond individuals.

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further possibilities for corruption in the electoral process. We have no occasion here to express any view on the constitutionality of specific limitations on contributions to political committees. *But cf. California Medical Association* v. *FEC*, No. 79-4426, slip op. at 25-26 (9th Cir. 23 May 1980).

(Wallace, J., concurring and dissenting):

> Only in conjunction with outside donors will some unincorporated associations be able to aggregate sufficient funds and expertise to compete effectively in the political market place with other more affluent 'persons' capable of huge personal expenditures.

The Court there overturned "substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression. . . ."[41]

Furthermore, the Supreme Court has also emphasized that free expression may not be limited on the basis of the "identity of its source, whether corporation, *association*, union or individual."[42] As a "political committee" is defined in 26 U.S.C. section 9012 (9) as "any committee, association or organization" which receives contributions or makes expenditures for the purpose of influencing a candidate's election, it should fall under the same general protection reserved for groups and associations wishing to communicate their interests to the public. The fact of receipt of contribution (to finance expenditures) does not distinguish political committees from any other association which taken an active position on a candidate. Likewise, a political committee is no different under the First Amendment from a wealthy individual who may, it has been decided, lawfully dedicate his entire fortune to make independent expenditures paying for the same public communications, *e.g.*, television, magazine, newspaper, billboard advertisements, *etc.*, which the committee would undertake. Individuals—wealthy or otherwise—groups and associations, and political committees all engage in the same speech activities. In all cases the speech is

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[41] 424 U.S. at 58-59 (emphasis added). The Court also wrote: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, *groups*, and candidates." *Id.* at 39 (emphasis added).

[42] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978) (emphasis added).

meant to express active support for or opposition to a particular candidacy; *i.e.*, to express affiliation with and approval for the ideas of that candidate, or the reverse. This active support or opposition is buttressed by the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." [43]

2. *Freedom of Association Requires That Individuals Be Allowed to Join in Political Committees*

If section 9012(f) were not struck down, individuals of modest means would have no right to join with others to state their views to the public with some force. This right of association is crucial under the Constitution and recognized in *Buckley*. We believe what the *Buckley* Court said about FECA's contribution and expenditure limits is dispositive here on the right of individuals to join political committees and thereby amplify their ability to speak publicly on matters of political concern. The Court said:

> The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with

---

[43] *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

We note that the election law exempts press organizations, 26 U.S.C. § 9012(f)(2)(A), and tax-exempt "section 501(c)" organizations, *id.* § 9012(f)(2)(B), from the limitations applicable to political committees. This discrimination against political committees along with the discrimination in favor of wealthy individuals is without constitutional foundation.

a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but *leave the contributor free to become a member of any political association and* to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. See *NAACP* v. *Alabama*, 357 U.S. at 460. The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents," *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion). See *Cousins* v. *Wigoda*, 419 U.S., at 487-488; *NAACP* v. *Button*, 371 U.S. 415, 431 (1963).[44]

Politics is, after all, the unifying theme among members of political committees; their associational tie is the desire to affirm publicly their political viewpoint held in common. The organizers of political committees really only mobilize existing political sentiment

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[44] *Buckley* v. *Valeo*, 424 U.S. at 22-23 (emphasis added).

looking for an outlet—the small size of contributions freely given by diverse contributors expecting no personal glory or prospects of hobnobbing with celebrities attests to that. This phenomenon of the so-called political committees *is* the right of association to express political views together with others, and thereby impress the public. An independent association dedicated to effective political expression which was not in essence a "political committee" would be either an exempted organization,[48] or terribly quaint. The Constitution protects potent political voices along with the more effete ones; the First Amendment ensures both that persons may speak, and that they may speak together.

C. *Conclusion—Section 9012(f) Violates the First Amendment*

Given our holdings that section 9012(f) is an expenditure restriction, and is, therefore, a powerful inhibition on political speech, we must strike down that section as it fails to survive the strict scrutiny required by the First Amendment. The compelling governmental interest to fight electoral corruption is insufficient, here as in *Buckley*, to justify what amounts to a direct limitation on political speech. Whereas a presidential candidate by accepting public funds may choose for him or herself to do without unlimited contributions and expenditures, the candidate's public supporters have a separate, protected right to express themselves, individually or jointly. This preserves free access and full participation in the public debate.

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[48] *See* note 43 *supra*.

IV. COMMON CAUSE SUIT DISMISSED AS MOOT

In Count I of its lawsuit Common Cause sued for injunctive and declaratory relief to the effect that section 9012(f) applied to the defendant political committees and prohibited their proposed expenditures. This involves the same issue as in the action brought by the FEC, herein resolved against the FEC. Consequently, as in our 28 August 1980 Order, we dismiss Count I of Common Cause's action as mooted pursuant to our decision in the FEC action. We express no opinion whether Common Cause possessed the requisite Article III characteristics to press Count I of its lawsuit before this court.

V. COMMON CAUSE MAY NOT SUE *TO ENFORCE* THE ELECTION LAWS

Count II of the Common Cause complaint does not implicate section 9012(f)'s prohibitions against independent expenditures. Rather, the theory of Count II is "that the defendant committees are not in fact independent of Ronald Reagan and his authorized committees. The violations of the Fund Act that Count II alleges are violations that result from, and are premised upon, coordination and concerted action between defendant committees and the Reagan campaign." [46] We understand Count II to be an impermissible attempt by Common Cause, a private plaintiff, to enforce the Fund Act. We are without subject-matter jurisdiction under section 9011(b) to

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[46] Plaintiffs' Opening Brief on the Merits at 50.

hear this claim.[47] The FEC is charged by statute with exclusive enforcement jurisdiction of the election laws, and moreover, the alleged illegal coordination would violate Fund Act provisions only with respect to *candidates*, not the defendant political committees; therefore, we hold also that Count II fails to state a claim upon which relief can be granted.

A. *No Subject-Matter Jurisdiction to Hear a Coordination Claim*

Section 9011(b) of the Fund Act grants jurisdiction to three-judge district courts of the United States to entertain actions "to implement or construe" provisions of the Fund Act whether or not the plaintiff has exhausted administrative or other remedies.[48]

Count II, though, raises complicated questions of fact and difficult questions of election law policy which are without the scope of "implement or construe." It would be incongruous and cumbersome for a three-judge court, ordered by Congress to expedite its consideration,[49] to supervise extensive discovery and receive detailed factual evidence. This fact-finding, of course, is prerequisite to—and pertains to—a determination of *compliance* with the election laws.

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[47] Whether a single-judge district court would have jurisdiction under 28 U.S.C. § 1331 (1976) (federal question jurisdiction) is not before this court. Our holding dismissing Count II does not require explicit consideration of the Article III "case or controversy" requirement. As we find ourselves without subject-matter jurisdiction we leave open the question of Common Causes's standing to bring Count II of its complaint.

[48] 26 U.S.C. § 9011(b)(1) & (2) (1976).

[49] 26 U.S.C. § 9011(b)(2) (1976).

A compliance issue is not one properly before a three-judge court charged with implementation and construction of a congressional act; and, an expedited judgment on compliance is not appropriate to a non-expert three-judge court evaluating in the first instance circumstances surrounding an election controversy.

Congress ordered expedition in judicial review under section 9011(b) because elections come up fast and candidates, whoever they turn out to be, and others, need to know whether and how the election laws apply, and how much they provide.[50] So that elections run smoothly, Congress has provided only that three-judge courts (with direct appeal to the Supreme Court) shall: quickly construe doubtful (or, dubious) sections of the Fund Act, and/or quickly implement the Act's funding mechanism for the benefit of entitled candidates.

Three-judge district courts are convened typically in order to judge a statute's constitutionality on its face, or to clarify a statute's meaning and application pursuant to standard judicial statutory construction. Three-judge district courts were used in *Buckley* and *Republican National Committee* as a forum for constitutional challenges to the Fund Act.[51] In short, we view the section 9011(b) jurisdiction of

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[50] *See* S. CONF. REP. No. 92-533, 92d Cong., 1st Sess. 53-54 (1971); 117 CONG. REC. H. 12, 119 (9 Dec. 1971).

[51] *See also Jones* v. *Branigin*, 433 F.2d 576 (6th Cir. 1970), *cert. denied*, 401 U.S. 977 (1971) (substantial constitutional question prerequisite to convening of three-judge district court). All precedents are in accord supporting the proposition that three-judge district courts are extraordinary legal forums which are convened only to hear cases of special public interest.

this court narrowly. The narrow view is inherent in "implement or construe," by which we understand Congress to have limited the competence of this court to questions of fundamental statutory interpretation and to pressing pre-election questions of uncertainty regarding funds allocable to candidates.[52] Questions of Fund Act violations that require elaborate investigation of unique factual situations are not proper subjects for this court.

B. *FEC Has Exclusive Enforcement Jurisdiction*

Congress has legislated in no uncertain terms with respect to FEC dominion over the election law. Section 437c(b)(1) of FECA reads:

> The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and Chapter 95 and Chapter 96 of Title 26 [*i.e.*, the Fund Act]. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.[53]

Since we view Count II as clearly an enforcement action, an action to ensure compliance with various provisions of the Fund Act, we must hold that FECA's section 437c(b)(1) precludes any consideration of alleged coordination of expenditures as pressed by Common Cause before this court.

The FEC itself adjudges Count II of the Common Cause complaint as an action to enforce the election

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[52] The time-sensitivity of a candidate's—and others'—need to know about available funds explains § 9011(b)'s provision of jurisdiction notwithstanding any exhaustion of administrative remedies.

[53] 2 U.S.C. § 437c(b)(1), as amended by Pub. L. No. 96-187, § 306(b)(1), 93 Stat. 1355 (1979).

laws.[54] The FEC which was allowed to intervene in the Common Cause action moved to dismiss Common Cause's complaint for lack of subject-matter jurisdiction.

The FEC's position on its enforcement jurisdiction has recently been vindicated by a panel of the Court of Appeals for this circuit.[55] That court held that violations of the election laws[56] must first be brought before the FEC as within that agency's exclusive jurisdiction. The *Carter-Mondale* holding that the FEC has exclusive jurisdiction with respect to alleged campaign violations and noncompliance controls here.[57]

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[54] FEC Motion to Dismiss at 11 & n.8. The FEC contended in footnote 8 that its "suit clearly differs from Common Cause's suit as the Commission's suit does not seek enforcement of the Act," rather, it "seek[s] only [a] declaratory judgment of the construction and constitutionality of 26 U.S.C. § 9012(f) pursuant to 26 U.S.C. § 9011(b)." In text the FEC wrote that Common Cause was simply "bring[ing] an enforcement action in the guise of a suit to implement or construe the statute."

[55] *Carter-Mondale Reelection Committee, Inc.* v. *Federal Election Commission*, Nos. 80-1841 & 80-1842, slip op. (D.C. Cir. 12 Sept. 1980).

[56] The alleged violations in *Carter-Mondale* involved the same issues of coordination between political committees and the official Reagan campaign that are the substance of Common Cause's Count II. *See id.* at 8.

[57] "Exclusive jurisdiction," held the court, was especially powerful in the election law context. The law "provides for FEC enforcement through both informal consent proceedings and formal proceedings." *Id.* at 11. An FEC investigation may completely absolve the challenged conduct, or may result in a partial vindication resolved by a consent decree. The intrusion of massive discovery requests by a private

C. *Alleged Violations in Count II Do Not Apply to Political Committees*

Common Cause alleges in Count II that the defendant committees' proposed expenditures will violate sections 9003(b)(1), 9003(b)(2), 9012(a)(1), and 9012(b)(1) of the Fund Act. These provisions apply to presidential candidates who receive federal funding and must, therefore, limit their own expenditures and forgo private contributions.[58] Each of these sections can be violated only by *the candidate* receiving federal funds. Thus Count II does not state a claim alleging a violation of the Fund Act by the defendant political committees. This also confirms the impropriety of permitting a private party to enforce the election laws at its own discretion. For these reasons we dismiss Count II also for failure to state a claim upon which relief can be granted.

---

party, like Common Cause, would plainly upset the delicate balance in the structure of campaign regulation. Common Cause would unsettle the coherent administration of election law policy and practice if allowed to go forward with Count II of its complaint.

[58] Candidates may not restrict the individual rights of their supporters as a result of the choice to accept public funding. *See* notes 30-32 & accompanying text *supra*.

CONCLUSION

Consistent with our Orders of 28 August 1980, we deny the FEC's motion for summary judgment and grant summary judgment for the defendant political committees and individuals on the grounds that section 9012(f) violates the Constitution. We dismiss Count I of the complaint brought by Common Cause as moot; Count II is dismissed for lack of subject-matter jurisdiction and for failure to state a claim.

So ordered.

/s/ Edward A. Tamm
EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

Sep. 30, 1980

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 80-1754

Three-Judge Court

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

ORDER

The Court, having before it the pleadings, motions, affidavits, and briefs of the parties and amici curiae, heard oral argument on August 19, 1980. Because of the nature of the case the Court is of the view that the decision, like the briefing and argument, should be expedited, with opinion or opinions to follow.

It is therefore ORDERED

1. That the motion of the American Civil Liberties Union Fund of the National Capital Area for leave to participate as Amicus Curiae is GRANTED.
2. That the motion of Common Cause to intervene is DENIED.

3. That the motion of the Plaintiff Federal Election Commission for Summary Judgment is DENIED.
4. That the motions of the Defendants Americans for Change, Americans for an Effective Presidency, and Fund for a Conservative Majority for Summary Judgment are GRANTED.
5. That all other pending motions by all parties are DENIED.

/s/ Edward A. Tamm
EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

Aug. 28, 1980

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CA 80-1609

Three-Judge Court

COMMON CAUSE, ET AL., PLAINTIFFS

v.

HARRISON SCHMITT, ET AL., DEFENDANTS

FEDERAL ELECTION COMMISSION, INTERVENOR

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

ORDER

The Court hereby orders that the above cases be consolidated.

/s/ Edward A. Tamm
EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

Sep. 24, 1980

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1754

(Three-Judge Court)

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

Civil Action No. 80-1609

(Consolidated)

(Three-Judge Court)

COMMON CAUSE, ET AL., PLAINTIFFS

v.

HARRISON SCHMITT, ET AL., DEFENDANTS
FEDERAL ELECTION COMMISSION, INTERVENOR

NOTICE OF APPEAL

Notice is hereby given that plaintiff Federal Election Commission appeals to the Supreme Court of the United States, pursuant to 26 U.S.C. § 9011(b)

and 28 U.S.C. § 2101(b), from the final order entered in this action on August 28, 1980.

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Kathleen Imig Perkins
KATHLEEN IMIG PERKINS
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OCTOBER 8, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1754

(Three-Judge Court)

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

Civil Action No. 80-1609

(Consolidated)

(Three-Judge Court)

COMMON CAUSE, ET AL., PLAINTIFFS

v.

HARRISON SCHMITT, ET AL., DEFENDANTS

FEDERAL ELECTION COMMISSION, INTERVENOR

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Notice of Appeal upon each of the parties to this action and upon the Solicitor General of the

United States by first-class mail to the following persons:

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OCTOBER 8, 1980

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-441

FEDERAL ELECTION COMMISSION, APPELLANT

v.

AMERICANS FOR CHANGE, ET AL.

FEDERAL ELECTION COMMISSION, APPELLANT

v.

HARRISON SCHMITT, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including December 28, 1980.

/s/ Warren E. Burger
Chief Justice of the
United States

Dated this 19th day of November, 1980

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PENN, J.

Civil Action No. 80-1754

FEDERAL ELECTION COMMISSION, PLAINTIFF
1325 K Street, N.W.
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v.

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COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this court is invoked under 28 U.S.C. § 1345 as an action commenced by an agency of the United States expressly authorized to sue by an act of Congress. This action is instituted pursuant to the Presidential Election Campaign Fund Act ("Fund Act"), which provides that the Federal Election Commission may institute in the United States district courts such actions, including those for declaratory relief, as may be appropriate to implement or construe provisions of the Fund Act. 26 U.S.C. §§ 9011(b)(1) and (2), 9010(c).

2. Convening of a three-judge district court to hear and make a determination in this action for declaratory judgment brought to implement and construe a provision of the Fund Act is required by 26 U.S.C. §§ 9011(b)(2) and 9010(c). Those statutory provisions also require that this action be heard and determined on an expedited basis.

3. Venue is properly found in the district of the District of Columbia.

PARTIES

4. Plaintiff Federal Election Commission (hereinafter "the Commission") is the independent agency of the United States vested with the authority to litigate questions involving the construction, implementation and validity of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, as well as the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-435, and the Presidential Primary Matching Payment Account Act, 26 U.S.C.

§§ 9031-9042. The Commission is also vested with primary and exclusive jurisdiction with respect to civil enforcement of these laws. *See* 2 U.S.C. §§ 437c (b)(1), 437d(a)(6), 437d(e); 26 U.S.C. §§ 9005 (a), 9007(a) and (b), 9010(c), 9011(b), 9036(a), 9038(a) and (b), 9040(b), (c) and (d).

5. Defendant Americans for Change ("AFC") is an unincorporated association and a political committee within the definitions of 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AFC registered with the Commission on May 23, 1980, designating as its records custodian Stan Huckaby, assistant treasurer, whose mailing address is 310 First Street, S.E., Washington, D.C. AFC listed as its sole campaign depository the American Security Bank of Washington, D.C.

6. Defendant Americans for an Effective Presidency ("AEP") is an unincorporated association which is a political committee as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AEP registered with the Commission on July 9, 1980, designating as its treasurer Robert H. Masson, and listing as its address, 1225 19th Street, N.W., Washington, D.C.

7. Defendant Fund for a Conservative Majority ("FCM") is a political committee, as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). FCM originally registered as a political committee in 1972 as the "Young Americans' Campaign Committee". On October 13, 1976, FCM filed an amendment changing its name to Fund for a Conservative Majority. The chairman of FCM is designated as Robert C. Heckman.

STATEMENT OF CLAIM

8. Pursuant to 26 U.S.C. §§ 9003(a) and (b), 9004(a)(1) and 9006, the presidential nominees of

the Democratic and Republican parties will be eligible to receive public federal funding of their campaigns in the 1980 general election. *See* 26 U.S.C. § 9002(2), (4) and (6), 9003(b), and 9004(a)(1). Upon information and belief, the candidates nominated by both the Democratic and Republican parties will elect to request public financing of their general election campaigns pursuant to the provisions of section 9005 of the Fund Act. 26 U.S.C. § 9006.

9. Section 9012(f) of the Fund Act, entitled "Unauthorized expenditures and contributions," provides with respect to committee expenditures to support publicly financed candidates that:

> it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

26 U.S.C. § 9012(f)(1).

10. Defendants AFC, AEP, and FCM, by registering with the Commission pursuant to 2 U.S.C. §§ 431(4)(A) and 433, and by their public announcements and statements, have indicated that each is a political committee which will knowingly and willfully expend in excess of $1000 prior to November, 1980, in support of the election of the candidate for President nominated by one of the major political parties. *See* 26 U.S.C. 9002(6).

11. Such expenditures, to be made by these political committees to further the election of a major party presidential candidate funded pursuant to 26 U.S.C. § 9006(b), will be expenditures "which would constitute qualified campaign expenses if incurred by an authorized committee of such candidate[s], in an aggregate amount exceeding $1,000." 26 U.S.C. § 9012(b). *See* 26 U.S.C. § 9002(1), (4) and (11).

12. The Commission, seeking to fulfill its statutory authority to litigate questions involving the construction, implementation and validity of the Fund Act and to prevent violations of the Fund Act, *see* 2 U.S.C. §§ 437c(b)(1) and 437d(a)(9), institutes this action pursuant to 26 U.S.C. §§ 9011(b) and 9010(c) in order to obtain a declaration implementing and construing section 9012(f) of the Fund Act as prohibiting the conduct defendants will undertake, as described in paragraph 10 and 11, above. *See also* 2 U.S.C. § 437d(a)(6).

WHEREFORE, Plaintiff Federal Election Commission prays that this court:

(1) promptly convene a three-judge district court pursuant to 26 U.S.C. §§ 9011(b)(2) and 9010(c);

(2) declare that the expenditures defendants intend to undertake in the 1980 general election in support of the publicly funded campaign of the Presidential nominee of one of the major political parties, are prohibited by and would be in violation of 26 U.S.C. § 9012(f)(1);

(3) declare that 26 U.S.C. § 9012(f)(1) as applied to the defendants is constitutional;

(4) order such other and further relief as the court deems appropriate.

Respectfully submitted,

/s/ Charles N. Steele
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☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 854601 202

Office-Supreme Court, U.S.
FILED
MAY 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1067

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, APPELLANT

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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MAY 9, 1981

QUESTION PRESENTED

Whether a provision of the Presidential Election Campaign Fund Act which limits the amount of money that political committees may spend to further the election of publicly financed presidential candidates is consistent with the first amendment to the Constitution of the United States, where Congress has determined that such a limit promotes compelling governmental interests and is necessary to preserve public funding as an alternative means of financing presidential election campaigns.*

---

* Other parties to the proceeding are Americans for an Effective Presidency and Fund for a Conservative Majority. Consolidated with No. 80-849, *Common Cause, et al.* v. *Harrison Schmitt, et al.*, (three-judge court); additional parties are Carl T. Curtis, Winifred Long and David Cohen.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THIS COURT SHOULD AFFIRM CONGRESS'S JUDGMENT THAT A LIMITATION ON INDEPENDENT EXPENDITURES BY UNAUTHORIZED POLITICAL COMMITTEES IS NECESSARY TO THE PUBLIC FINANCING OF PRESIDENTIAL ELECTIONS	7
A. Substantial Legislative History Supports Congress's Judgment That The General Welfare Of The Citizens Of The United States Is Best Served By Total Public Financing Of Presidential Elections	12
B. Section 9012(f) Is Necessary To Preserve The Integrity Of The Presidential Election Campaign Fund Act	18
C. Section 9012(f) Is Entitled To A Presumption Of Constitutionality	27
II. THE DISTRICT COURT HELD UNCONSTITUTIONAL AN INTEGRAL PROVISION OF THE PRESIDENTIAL ELECTION CAMPAIGN FUND ACT WITHOUT REGARD TO CONGRESS'S JUDGMENT AS TO ITS NECESSITY AND AS TO ITS CONSTITUTIONALITY	30
III. THIS COURT'S PRIOR DECISIONS SUPPORT THE CONSTITUTIONALITY OF § 9012(f)	33

ARGUMENT—Continued Page

IV. 26 U.S.C. § 9012(f) IS CONSISTENT WITH FIRST AMENDMENT FREEDOMS OF SPEECH AND ASSOCIATION 40

V. SECTION 9012(f) SERVES SUFFICIENTLY COMPELLING GOVERNMENTAL INTERESTS TO SUSTAIN EVEN A SIGNIFICANT INTERFERENCE WITH FIRST AMENDMENT RIGHTS 50

CONCLUSION 51

TABLE OF AUTHORITIES

Cases

American Civil Liberties Union v. *Jennings*, 366 F.Supp. 1041, (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *American Civil Liberties Union*, 422 U.S. 1030 (1975) 43

American Communications Association v. *Douds*, 339 U.S. 382 (1950) 19

Branti v. *Finkel*, 445 U.S. 507 (1980) 39

Bread Political Action Committee v. *Federal Election Commission*, 635 F.2d 621 (7th Cir., 1980), (en banc), *appeal docketed* No. 80-1481 (March, 1981) 34

Brown v. *Board of Education*, 347 U.S. 483 (1954) 33

Buckley v. *Valeo*, 519 F.2d 817 and 821 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976) ..... *passim*

Burroughs v. *United States*, 290 U.S. 534 (1934).. 7, 23, 28

California v. *LaRue*, 409 U.S. 116 (1972) 28

California Medical Association v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 (9th Cir. May 23, 1980), *possible jurisdiction postponed* No. 79-1952 (October 6, 1980) 33, 34, 49

Champlin Refining Co. v. *Corporation Commission*, 286 U.S. 210 (1932) 21

Civil Service Commission v. *Letter Carriers*, 413 U.S. 548 (1973) 43, 44

Cases—Continued Page

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Dandridge v. *Williams*, 397 U.S. 471 (1970) 19
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Dennis v. *United States*, 341 U.S. 494 (1951)..... 30
Elrod v. *Burns*, 427 U.S. 347 (1976) 25, 39
Ex parte Yarbrough, 110 U.S. 651 (1884) 7
Federal Election Commission v. *Lance*, 635 F.2d 1132 (5th Cir. 1981) (en banc) 34
Federal Election Commission v. *National Right to Work Committee*, 501 F.Supp. 422 (D.D.C. 1980), *appeal docketed*, Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980) 34, 48
Federal Election Commission v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978) 34
Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 29
First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) ..... *passim*
Flemming v. *Nestor*, 363 U.S. 603 (1960) 19, 27
Fullilove v. *Klutznick*, —— U.S. ——, 100 S.Ct. 2758 (1980) 28, 29
Gelman v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 (D.C. Cir. July 18, 1890), *cert. denied*, —— U. S. ——, 101 S.Ct. 219 (1980) 35
Grayned v. *City of Rockford*, 408 U.S. 104 (1972).. 42
Health Research Group v. *Kennedy*, 82 F.R.D. 21 (D.D.C. 1979) 48
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 28
Helvering v. *Davis*, 301 U.S. 619 (1937) 8
Hunt v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977) 48
Johnson v. *United States*, 163 F. (1st Cir. 1908).. 30
Katzenbach v. *McClung*, 379 U.S. 294 (1964)..... 28

Cases—Continued

	Page
Katzenbach v. *Morgan*, 384 U.S. 641 (1966)	28
Kovacs v. *Cooper*, 336 U.S. 77 (1949)	42
Landmark Comm. Inc. v. *Virginia*, 435 U.S. 829 (1978)	30
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974)	27
Louisville Gas Co. v. *Coleman*, 277 U.S. 32 (1928)	23
Marchioro v. *Chaney*, 442 U.S. 191 (1979)	*passim*
McClean v. *Arkansas*, 211 U.S. 539 (1909)	28
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)	8, 29, 30
McGowan v. *Maryland*, 366 U.S. 420 (1961)	27
Minnesota v. *Clover Leaf Creamery Co.*, —— U.S. ——, 101 S.Ct. 715 (1981)	29
Missouri, Kansas & Texas Ry. Co. v. *May*, 194 U.S. 267 (1904)	11
Mott v. *Federal Election Commission*, 494 F. Supp. 131 (D.D.C. 1980), *appeal docketed*, No. 80-1949 (D.C. Cir. Aug. 12, 1980), *appeal docketed*, No. 80-2069 (D.C. Cir. Sept. 4, 1980)	33
Munn v. *Illinois*, 94 U.S. 113 (1877)	28
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	48
Oklahoma v. *Civil Service Commission*, 330 U.S. 127 (1947)	19
Oregon v. *Mitchell*, 400 U.S. 112 (1970)	9, 28
Republican National Committee v. *Federal Election Commission*, 487 F.Supp. 280 (S.D.N.Y. 1980), 616 F.2d 1 (2d Cir. 1980) (en banc) (per curiam), *aff'd mem.*, 445 U.S. 955 (1980)	*passim*
Richardson v. *Belcher*, 404 U.S. 78 (1971)	19
Storer v. *Brown*, 415 U.S. 724 (1974)	6, 7, 38
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947)	12, 43
United States v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973)	34
United States v. *Brewers' Association*, 239 F. 163 (W.D. Pa. 1916)	34
United States v. *Butler*, 297 U.S. 1 (1936)	8

Cases—Continued

	Page
United States v. *Carolene Products Co.*, 304 U.S. 144 (1938)	27
United States v. *Chestnut*, 533 F.2d 40 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976)	34
United States v. *Classic*, 313 U.S. 299 (1941)	8
United States v. *Clifford*, 409 F.Supp. 1070 (E.D. N.Y. 1976)	34
United States v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948)	24, 34
United States v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567 (1957)	24, 34
United States v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972)	43
United States v. *O'Brien*, 391 U.S. 367 (1968)	42
United States v. *Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972)	34
United States v. *Robel*, 389 U.S. 258 (1967)	28, 29
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978)	32
Virginia Pharmacy Board v. *Virginia Consumer Council*, 425 U.S. 748 (1976)	42
Welsh v. *United States*, 398 U.S. 333 (1970)	30
Wyman v. *James*, 400 U.S. 309 (1971)	19, 23

Statutes and Regulations

2 U.S.C. § 431(4)	3, 4
§ 431(8)(B)	43, 44
§ 431(9)	42
§ 431(17)	42
§ 437d(a)(6)	3
§ 437c(b)(1)	3
§ 437d(e)	3
§ 441a(a)(1)(B)	44
§ 441a(a)(2)(B)	44
§ 441a(a)(4)	46
§ 441a(b)(1)(B)	40

Statutes and Regulations—Continued

		Page
	§ 441a(d)	26, 44
	§ 441b	34
	§ 441b(b)(2)(A)	42
former 18 U.S.C.	§ 608(c)(1)(B)	40
	§ 608(f)	44
26 U.S.C.	§ 9002(1)	10
	§ 9002(4)	18
	§ 9002(6)	18
	§ 9002(7)	18
	§ 9002(8)	18
	§ 9002(9)	3, 4
	§ 9002(11)	8
	§ 9003	*passim*
	§ 9004	*passim*
	§ 9005(a)	3
	§ 9006	8
	§ 9007	3, 19
	§ 9010(c)	3
	§ 9011(b)	*passim*
	§ 9012(a)	8, 19
	§ 9012(b)	8, 19, 41
	§ 9012(f)	*passim*
	§ 9036	3
	§ 9040(b)	3
	§ 9040(c)	3
	§ 9040(d)	3
28 U.S.C.	§ 2284	3
11 C.F.R.	§ 9002.11(b)(5)	42
	§ 9003.3	42
Pub. L. No. 80-809, 80 Stat. 1587 (1966)		13
Pub. L. No. 92-178, 85 Stat. 373 (1971)		*passim*
Pub. L. No. 92-225, 86 Stat. 3 (1972)		33
Pub. L. No. 93-443, 88 Stat. 1263 (1974)		33
Pub. L. No. 94-284, 90 Stat. 475 (1976)		33
Pub. L. No. 95-216, 91 Stat. 1655 (1977)		33
Pub. L. No. 96-187, 93 Stat. 1339 (1980)		33

Legislative History

	Page
112 Cong. Rec. 13,538 (1966)	12
112 Cong. Rec. 13,544 (1966)	15
112 Cong. Rec. 28,083 (1966)	15
112 Cong. Rec. 28,248 (1966)	14
112 Cong. Rec. 28,249 (1966)	14
112 Cong. Rec. 28,765 (1966)	14
112 Cong. Rec. 28,779 (1966)	14
112 Cong. Rec. 28,781 (1966)	15
113 Cong. Rec. 8060 (1967)	15
113 Cong. Rec. 8061 (1967)	15
113 Cong. Rec. 8063 (1967)	16
113 Cong. Rec. 8295 (1967)	16
113 Cong. Rec. 8297 (1967)	9
113 Cong. Rec. 8304 (1967)	16
113 Cong. Rec. 8309 (1967)	11
113 Cong. Rec. 9386 (1967)	16
113 Cong. Rec. 9397 (1967)	16
113 Cong. Rec. 9978 (1967)	17
113 Cong. Rec. 10,201 (1967)	17
113 Cong. Rec. 12,169 (1967)	17
117 Cong. Rec. 41,745-48 (1971)	8
117 Cong. Rec. 41,762 (1971)	8, 10
117 Cong. Rec. 41,767 (1971)	13
117 Cong. Rec. 41,771 (1971)	13
117 Cong. Rec. 41,775 (1971)	28
117 Cong. Rec. 41,777 (1971)	12
117 Cong. Rec. 41,778 (1971)	10, 11, 12
117 Cong. Rec. 41,779 (1971)	18
117 Cong. Rec. 41,780 (1971)	17, 18, 22, 28
117 Cong. Rec. 41,937 (1971)	18, 28
117 Cong. Rec. 41,938 (1971)	18
117 Cong. Rec. 41,947 (1971)	9
117 Cong. Rec. 41,965 (1971)	9
117 Cong. Rec. 42,377 (1971)	10
117 Cong. Rec. 42,397 (1971)	21, 22, 28
117 Cong. Rec. 42,399 (1971)	11, 23
117 Cong. Rec. 42,402 (1971)	21
117 Cong. Rec. 42,626 (1971)	21, 22
117 Cong. Rec. 42,627 (1971)	21, 22
120 Cong. Rec. 27,244 (1974)	49

Legislative History—Continued	Page
H.R. Doc. No. 1, 60th Cong., 1st Sess. (1910)	13
S. Res. No. 225, 74th Cong., 2nd Sess. (1936)	13
S. Rep. No. 151, 75th Cong., 1st Sess. (1937)	9, 13
S. Rep. No. 92-553, 92nd Cong., 1st Sess. (1971)	8, 10
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Hearings on S. 3496 Before the Senate Committee on Finance, 89th Cong., 2d Sess. (1966)	9, 14
Hearings on H.R. 1 Before the Committee on House Administration, 96th Cong., 1st Sess. (1979)	39
United States Constitution, art. I, § 4	7
art. I, § 8, cl. 1	8
art. I, § 8, cl. 2	35
First Amendment, United States Constitution	*passim*
Fourteenth Amendment, United States Constitution	28
Madison, The Federalist Papers, No. 10	38
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Hamilton, The Federalist Papers, No. 30	8
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Emerson, First Amendment Doctrine and the Burger Court, 68 Cal. L. Rev. 422 (1980)	28
AO 1976-51, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5215	46
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AO 1980-126, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577	45
AOR 1980-61, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 3564, *withdrawn* ¶ 51	46
Presentations, *FECA: After a Decade of Political Reform, A National Conference by Citizen's Research Foundation* (April 3, 1981)	26, 39, 47

Miscellaneous Page

Final Report to the Committee on House Administration by the Campaign Finance Study Group, The Institute of Politics, Harvard University (May 1979) 24
Boston Globe February 5, 1980 25
Knight Newspapers, February 18, 1981, *cited in* The American Political Reports, Vol. X, No. 12, February 27, 1981 27
National Journal, September 13, 1980 25
New York Times, June 11, 1971 18
New York Times, September 22, 1980 25
Newsday, September 28, 1980 27
Washington Post, May 5, 1981 25
Washington Star, May 6, 1981 27
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ABC New Nightline, July 7, 1980 25

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1607

FEDERAL ELECTION COMMISSION, APPELLANT

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the district court is not yet officially reported, but appears at Appendix A of the Federal Election Commission's Jurisdictional Statement at 1a ("FEC J.S. App. at ——.")

JURISDICTION

Jurisdiction is conferred by 26 U.S.C. § 9011(b) and 28 U.S.C. §§ 1252 and 2101(b).

A three-judge district court was convened pursuant to 26 U.S.C. § 9011(b) to "implement or construe" 26 U.S.C. § 9012(f). On August 28, 1980, the three-judge court entered two expedited orders granting, *inter alia*, appellees' motions for summary judgment. *See* Joint Appendix at 17 ("J.A. at ——), FEC J.S. App. at App. B, 35a. On September 30, 1980, the court issued an

opinion holding 26 U.S.C. § 9012(f) unconstitutional and entered a further order disposing of the case consistent with its earlier orders. J.A. at 17, FEC J.S. App. at App. A, 1a. Appellant's Jurisdictional Statement was filed timely on December 29, 1980, and this Court noted probable jurisdiction, consolidating this case with No. 80-847, on February 23, 1981. J.A. at 18.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abriding the freedom of speech, or of the press; or the right of the people to assemble. . . .

26 U.S.C. § 9012(f) provides in relevant part:[1]

> . . . [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

STATEMENT OF THE CASE

This case seeks review by this Court of a decision of the United States District Court for the District of Columbia (three-judge court). That decision resulted after the Federal Election Commission ("the Commission" or "FEC")[2] filed a complaint on July 15, 1980,

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[1] On December 29, 1980, the Federal Election Commission lodged 10 copies of "Federal Election Campaign Laws" with the Court. The Presidential Election Campaign Fund Act ("the Fund Act") is set forth in its entirety therein, and the full text of 26 U.S.C. § 9012(f) appears therein at 74.

[2] Appellant FEC is the independent agency of the United States government vested with the authority to litigate questions involving the construction, implementation and validity of the Presidential

pursuant to 26 U.S.C. §§ 9010(c) and 9011(b)[3] seeking to implement and construe 26 U.S.C. § 9012(f) as applicable to appellant committees. *See* J.A. at 17, FEC J.S. App. at 43a.

On August 28, 1980, the three-judge district court issued an expedited order denying the Commission's motion for summary judgment and granting summary judgment for the defendants.[4] The court also denied a motion

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Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, as well as the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, "FECA" and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. The Commission is also vested with exclusive jurisdiction with respect to civil enforcement of these laws. *See* 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e); 26 U.S.C. §§ 9005(a), 9007(a) and (b), 9010(c), 9011(b), 9036(a) and (b), 9040(b), (c) and (d).

[3] Section 9010(c) authorizes the Commission to seek declaratory and injunctive relief from federal courts with regard to civil matters covered by the Fund Act. And § 9011(b) states that the Commission may institute actions in federal courts to implement or construe the Fund Act. All such actions are "heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court." 26 U.S.C. §§ 9010(c), 9011(b). These jurisdictional provisions also require "the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited." *Id.*

[4] The Commission's suit named as defendants three political committees: (1) Americans for Change ("AFC"), an unincorporated association and a political committee within the definition of 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AFC registered with the Commission as a political committee by filing its Statement of Organization on June 3, 1980, and has since qualified as a multi-candidate political committee under FECA. (2) Fund for a Conservative Majority ("FCM"), a multi-candidate political committee, registered with the Commission. FCM originally registered in 1972 with the General Accounting Office as "Young Americans Campaign Committee." On October 13, 1976, FCM filed an amendment changing its name to Fund for a Conservative Majority. "Citizens for Reagan in 1980" is a "project" of FCM which is not separately registered with the Commission. (3) Americans for an Effective Pres-

filed by Common Cause to intervene in the Commission's suit, granted a motion filed by the American Civil Liberties Union Fund of the National Capital Area to participate as *amicus curiae*, and denied all other pending motions. *See* J.A. at 17, FEC J.S. App. B at 35a. That same day, August 28, 1980, the court issued an order in *Common Cause, et al.* v. *Schmitt, et al.* denying Common Cause's motion that its case be consolidated with the Commission's action; dismissing that part of the *Common Cause* complaint which asked that the court declare a violation of the Fund Act for lack of subject matter jurisdiction and failure to state a claim; dismissing that part of the *Common Cause* complaint which sought enforcement of 26 U.S.C. § 9012(f) "on the basis of the Court's decision in C.A. No. 80-1755, *Federal Election Commission* v. *Americans for Change, et al.*;" denying defendants' motions for protective orders as moot; and denying all other pending motions. *See* J.A. at 17, Common Cause's Jurisdictional Statement Appendix at 33a ("C.C. J.S. App. at ——").

Thereafter, on September 24, 1980, the court, *sua sponte*, ordered that the Commission's action be consolidated with *Common Cause* v. *Schmitt*. *See* J.A. at 17, FEC J.S. App. C at 37a. And, on September 30, 1980, the court rendered its judgment and opinion in *FEC* v. *Americans for Change*, declaring 26 U.S.C. § 9012(f) unconstitutional, the judgment herein appealed from. *See* J.A. at 17, FEC J.S. App. A at 1a.

The court concluded that this Court's analysis in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), "control[led] the election law case before this court," and that 26 U.S.C. § 9012(f) does not serve a sufficiently compelling governmental interest to outweigh what the court deemed its heavy burden on speech. *See* J.A. at 17, FEC J.S. App. A at

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idency ("AEP"), an unincorporated association which is a political committee as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AEP registered with the Commission as a political committee by filing its Statement of Organization on July 8, 1980, and has since qualified as a multi-candidate political committee.

9a, 21a. The court thus rejected Congress's conclusion that § 9012(f) is central to the objectives of making public financing of presidential elections a substitute for private financing and of furthering public participation in the political process. The court's judgment also necessarily ignores the congressional determination that the statute overall carefully balances individual rights and maximizes individual participation in the presidential election process while limiting the impactof large aggregations of wealth spent to further the election of publicly financed presidential candidates. *See* J.A. at 17, FEC J.S. App. A at 27a.

SUMMARY OF ARGUMENT

Congress has concluded, after more than seventy years of discussion, debate, and investigation, that the integrity of the presidential election process and confidence in the federal government—indeed in our very system of government—would be enhanced by funding presidential general election campaigns through individual tax dollars. The public funding system established by Congress, enacted in 1971 as the Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 573 (1971), allows individual taxpayers to participate voluntarily by way of a $1 tax return check-off to fund presidential election campaigns. Since the beginning of the fund in 1973, citizens have designated nearly 250 million of their income tax dollars to be used to provide campaign funds for presidential candidates. This high level of citizen participation has enabled every major party candidate since 1974 to free himself from the "rigors of fundraising" by opting for a publicly funded campaign.

Legislative history of the Fund Act and its predecessors is replete with discussion and debate over the purposes of public financing, the safeguards necessary to protect the proper use of public monies for public financing and the impact of such a program on individual first amendment freedoms. Congress clearly debated all sides

of this issue and concluded, as this Court has affirmed, that public financing of presidential election campaigns is a program which serves to enhance rather than restrict first amendment freedoms. *Buckley* v. *Valeo*, 424 U.S. 1, 92-3 (1976). Included in Congress's program is 26 U.S.C. § 9012(f) a carefully drawn statutory provision which limits, as narrowly as possible while still attaining congressional objectives, the expenditure of private funds by political committees in support of publicly financed presidential candidates. Congress debated the necessity and the constitutionality of such a limitation and concluded that a limitation of $1,000 was required to protect the goals of public financing. As this Court has held with regard to another limitation of the Fund Act:

> Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political affairs. We cannot say that Congress' choice falls without the permissible range.

Buckley v. *Valeo*, 424 U.S. at 103-104.

The district court's judgment that § 9012(f) is unnecessary to public financing and inconsistent with the first amendment fails to recognize the important governmental purposes advanced by Congress in support of the provision. Moreover, the judgment conflicts with other decisions of this Court holding the Fund Act constitutional, *Buckley* v. *Valeo*, *supra*, and *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y. 1980) (three-judge court), 616 F.2d 1 (2nd Cir. 1980) (en banc) (per curiam), *aff'd mem.*, 445 U.S. 955 (1980), and with other decisions delineating the scope of the first amendment and the importance of our two-party system of government. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). Section 9012(f), contrary to operating as an unconstitutional limitation

on individual first amendment freedoms, actually promotes individual participation in the presidential election process. This Court should reverse the judgment of the district court, find that § 9012(f) is consistent with the first amendment based upon application of previous decisions of the Court, and afford deference to the judgment of Congress in this regard.

ARGUMENT

I. THIS COURT SHOULD AFFIRM CONGRESS'S JUDGMENT THAT A LIMITATION ON INDEPENDENT EXPENDITURES BY UNAUTHORIZED POLITICAL COMMITTEES IS NECESSARY TO THE PUBLIC FINANCING OF PRESIDENTIAL ELECTIONS.

This case involves the validity of a provision of the Presidential Election Campaign Fund Act ("the Fund Act") and poses substantial questions concerning the authority of Congress to enact legislation protecting the integrity of the electoral process. The authority of Congress to regulate federal elections, including presidential election campaigns is clear. *Ex parte Yarbrough*, 110 U.S. 651, 657-8 (1884); *Buckley* v. *Valeo*, 424 U.S. 1, 13 (1976) (*"Buckley"*). This Court has held that:

> "as a practical matter there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." . . .

Marchioro v. *Chaney*, 442 U.S. 191, 196 (1979), *quoting Storer* v. *Brown*, *supra* at 730. *See Burroughs* v. *United States*, 290 U.S. 534, 545 (1934); United States Constitution, art. 1, § 4. It was pursuant to this grant of authority, together with the broad power granted under the general welfare clause[5] that Congress, in 1971, enacted the Fund Act.

The Fund Act is the product of more than seventy years of extensive congressional debate and hearings aimed at bringing meaningful reform to the area of

financing presidential election campaigns.[6] Enacted as part of the Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 573 (1971), the Fund Act established the present fund within the Department of the Treasury and inaugurated the voluntary taxpayer check-off system as "an alternative way of financing the general election campaign funds of presidential or vice-presidential candidates" S. Rep. No. 92-553, 92d Cong., 1st Sess. 56 (1971); 117 Cong. Rec. 41,762 (1971) (remarks of Sen. Pastore). Under the public financing scheme major party candidates who satisfy the eligibility requirements outlined in 26 U.S.C. § 9003 are entitled to equal payments from the fund to defray all of their "qualified campaign expenses", *i.e.*, expenses incurred by a presidential candidate and running mate, or any of their authorized committees, to further their election. 26 U.S.C. § 9002(11). Once a candidate has chosen a publicly financed campaign, he or she may accept private contributions only if they are necessary to make up for any deficiency in the fund. 26 U.S.C. §§ 9003(b)(2), 9012(b). In no event, however, may a publicly funded candidate spend more than his or her allotment under 26 U.S.C. § 9006. *See also* 26 U.S.C. § 9012(a).

Congress designed the Fund Act to eliminate the appearance and possibility of political *quid pro quos* preva-

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[5] The general welfare clause, United States Constitution, art. 1, § 8, cl. 1 is "a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the necessary and proper clause." *Buckley*, 424 U.S. at 90 *citing McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819). *See United States* v. *Classic*, 313 U.S. 299 (1941); *Helvering* v. *Davis*, 301 U.S. 640, 641 (1937); *United States* v. *Butler*, 297 U.S. 1, 16 (1936). *See also* Hamilton, The Federalist Papers Nos. 30 and 34; *cf.* Madison, The Federalist Papers No. 41. This Court has concluded that "public financing as a means to reform the electoral process [is] clearly within the granted power." *Buckley*, 424 U.S. at 90.

[6] *See* 117 Cong. Rec. 41,745-48 (1971) for a synopsis of proposed legislation aimed at reforming the electoral process by freeing candidates from over-dependence upon special interest groups.

lent in privately financed presidential campaigns and to foster individual participation and public discussion in the electoral process.[7] *See* S. Rep. No. 93-689, 93d Cong., 2d Sess. 9-10 (1974). Public financing would free the candidate from the rigors of fundraising;[8] promote public discussion of issues; restore public confidence in government; "make a major change that would be a tremendous improvement toward lifting the office of the Presidency above the power of private money to control it,"[9] 117 Cong. Rec. 41,947 (1971) (remarks of Sen. Long); "take the whole presidential electoral process out of the arena of big astronomical money," 117 Cong.

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[7] The growing influence of money in presidential elections with the concomitant possibility that large sums of money would buy an interest in government had concerned Congress since 1907. By 1971, congressional committees had held no less than 23 sets of hearings on election reform. Indeed, as early as 1937, a Special Senate Committee to Investigate Campaign Expenditures of Presidential, Vice-Presidential and Senatorial Candidates published a report based on extensive investigation of all facts relating to campaign expenditures, contributions and other means of influence in federal elections. The Committee recommended, *inter alia*, that, to curb the deleterious influence of money, "private contributions to political campaigns be prohibited entirely and that instead *all elections expenses be defrayed from public funds.*" S. Rep. No. 151, 75th Cong., 1st Sess. 17 (1937) (emphasis added). *See* 113 Cong. Rec. 8297 (1967) (remarks of Sen. Morton); *Hearings on S.3496 Before the Senate Committee on Finance*, 89th Cong., 2d Sess. 13 (1966). *See also 1956 General Election Campaign Report of the Subcommittee on Privileges and Elections, Together with Minority Views, Submitted to the Subcommittee on Rules and Administration*, 85th Cong., 1st Sess. 3 (1957). The committee expressed concern over heavy campaign expenditures which would "grow worse" without remedial action by Congress.

[8] In the words of Senator Humphrey, no presidential candidate "should have to go around with hat in hand or be held in suspicion." 117 Cong. Rec. 41,965 (1971) (remarks of Sen. Humphrey).

[9] This Court has recognized that "[e]ssential to the survival and to the growth of our national government is its power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent." *Oregon* v. *Mitchell*, 400 U.S. 112, 134 (1970).

Rec. 42,377 (1971) (remarks of Sen. Pastore); and thus "end the most flagrant single abuse in our democracy, the unconscionable power of money." 117 Cong. Rec. 41,778 (1971) (remarks of Sen. Kennedy).

In devising this comprehensive scheme Congress concluded that the Fund Act would not achieve its stated legislative objectives without some limitation on the expenditure of private funds. During the extensive debate on the Fund Act, Congress sought to assure that the receipt of federal funds would be a substitute to private funds, not a mere supplement to those funds, recognizing the delicate balance to be struck between attaining the stated goals of public financing and protecting individual first amendment freedoms. Congress determined that it had achieved this balance by enacting § 9012(f)—a narrow provision which limits only expenditures in excess of $1,000 by political committees, other than those authorized by the candidate, where such expenditures are made to further a publicly funded candidate's election and would, if incurred by the candidate's authorized committee,[10] constitute qualified campaign expenses. Indeed, it is § 9012(f) which assures that federal funds received by presidential candidates are not a mere supplement to private financing,[11] thus preventing circumvention of congressional objectives.

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[10] The term "authorized committee" is defined to mean any political committee which is authorized in writing by the candidate to incur expenses to further his or her election. 26 U.S.C. § 9002(1).

[11] *See, e.g.*, S. Rep. No. 92-553, 92d Cong., 1st Sess. 56 (1971); 117 Cong. Rec. 41,762 (1971) (remarks of Sen. Pastore). Absent § 9012(f), presidential election campaigns will not be totally funded from tax dollars. During the 1980 presidential general election campaign, while both major party candidates received $29.4 million in federal funds, five non-party political committees alone spent approximately $8 million in independent expenditures for President Reagan. It is during this period that the Congressional Club spent 90% of its $3,358,796 in independent expenditures, the National Conservative Political Action Committee ("NCPAC") spent 92% of its $2,102,301, FCM spent 55% of its $1,772,535, AEP spent 100% of its $1,270,208, and AFC spent 100% of its $711,856. *See* Data

Rather than completely prohibiting private spending by unauthorized groups, drafters of the original legislation, sensitive to constitutional concerns and interested in promoting direct individual expression, concluded that unauthorized committees would be permitted to spend up to $1,000 for publicly financed candidates. 117 Cong. Rec. 41,778 (1971) (remarks of Sen. Kennedy). Publicly financed presidential candidates would be allowed to defray qualified campaign expenditures only with public funds; individuals would remain free to make unlimited independent expenditures for the presidential candidate of their choice.[12] While sponsors of the legislation sought to prevent public funding from being a mere supplement to increased private spending, Congress at the same time "did not want to begin to straightjacket organizations that have a legal right . . . to express their personal opinion." 117 Cong. Rec. 42,399 (1971) (remarks of Sen. Pastore). Faced with these considerations, Congress determined to permit these groups to "operate up to $1,000," 117 Cong. Rec. 41,778 (1971) (remarks of Sen. Kennedy), a legislative determination entitled to deference by this Court.[13]

Congress had an abundant historical base from which to conclude, and the foresight to recognize, that political committee leaders raising large numbers of contributions

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Compiled from the Public Records of the Federal Election Commission ("*Data*") at 148, 184, 222, 224, 230. Twenty copies of the *Data* were lodged with this Court on April 28, 1981. This document was compiled from public disclosure records filed by political committees with the FEC.

[12] On individual first amendment freedoms, Senator Long observed: "You cannot prohibit a citizen from campaigning for the candidate of his choice. His constitutional right of free speech clearly permits him to go around the country speaking, shouting, carrying signs advocating the candidate he supports. . . ." 113 Cong. Rec. 8309 (1967) (remarks of Sen. Long).

[13] Appraising Congress's analysis, it is instructive to recall Justice Holmes' observation in *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270 (1904), "It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

and using this aggregated wealth to defray what would otherwise be qualified campaign expenses on behalf of presidential candidates presented a potential danger to the electoral process. The power and influence that these groups could exert or appear to exert over the particular candidate was a consequence to be avoided.[14] *See Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). It was this potential for abuse that motivated Congress to enact a public financing scheme, including § 9012(f) to diffuse the influence of large expenditures of money, which would "meet all major constitutional, practical and political objections." 117 Cong. Rec. 41,777 (remarks of Sen. Kennedy). A scheme so carefully designed after years of debate and congressional investigation cannot be easily disregarded.

A. Substantial Legislative History Supports Congress's Judgment That The General Welfare Of The Citizens Of The United States Is Best Served By Total Public Financing Of Presidential Elections.

There is "no aspect of public business which more directly affects the quality of government and the public welfare" than the electoral process. 117 Cong. Rec. 41,778 (1971) (remarks of Sen. Kennedy, *quoting* Sen. Gore). Supporters of public financing believed that private financing of presidential candidates "made a mockery of free democratic processes, undermining public confidence in those elected, and thus in the institution of government itself." *Id.* Congress determined that public financing was the means necessary to reestablish confidence in the electoral process and in government itself,

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[14] Indeed, where actions in the "judgment of Congress menace the integrity and the competency of [the political process], legislation to forestall such danger and adequate to maintain its usefulness is required." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 103 (1947). And in the words of Senator John J. Williams, since "public confidence in the elective process is the foundation of public confidence in government, there is no higher duty of a democratic government than to insure that confidence." 112 Cong. Rec. 13,538 (1966) (remarks of Sen. Williams).

to promote widespread participation in presidential election campaigns and to assure candidate responsiveness to the voters. *See* 117 Cong. Rec. 41,771 (1971) (remarks of Sen. Mathias); 117 Cong. Rec. 41,767 (1971) (remarks of Sen. Bentsen). Abundant legislative history supports this congressional judgment.

The "idea of mass support for political campaigns" was articulated as early as 1907 by President Theodore Roosevelt. *See* H.R. Doc. No. 1, 60th Cong., 1st Sess., pt. 1 at XLVII (1910). Congress subsequently engaged in lengthy and comprehensive debate and investigation of the concept. Congressional committees were convened to collect and investigate all facts relating to campaign expenditures, contributions and other means of influence as an "aid in enacting any remedial litigation." S. Res. No. 225, 74th Cong., 2d Sess. (1936), *cited in* S. Rep. No. 151, 75th Cong., 1st Sess. 2 (1937). As early as 1937, one such Special Committee observed that

> [t]he need for remedial legislation in the field of Federal elections is imperative and immediate. . . . [and that] [f]ew, if any, reforms are more direly needed in our democratic society.

Id. at 5. Indeed, Committee findings

> poignantly demonstrate[d] the need for effective limitations upon the amount of individual contributions and the desirability of providing incentives for mass contributions, or perhaps governmental assumption of the cost and responsibility for the conduct of Federal election campaigns and the curtailment of private subsidization of election campaigns.

Id.

The first concrete congressional attempt at drafting a public financing scheme was the Presidential Election Campaign Fund Act of 1966, known as the Long Plan for its sponsor, Senator Russell Long. Title IV, Pub. L. No. 80-809, 80 Stat. 1587 (1966). The proposal would have enabled every person to contribute voluntarily $1.00, through a tax deduction system, to a special fund which would be divided equally between, and given directly to,

the major parties. Senator Long, speaking in support of his proposal when it was introduced on June 15, 1966, stated that the Plan would get away from a system where candidates for President of the United States are beholden to groups making large campaign contributions or "obligated to any special group." 112 Cong. Rec. 28,765 (1966) (remarks of Sen. Long). Indeed as Senator Cannon noted:

> We are all interested in minimizing the dependency of any candidate on narrow economic interests and we wish to broaden as much as possible the base of that economic support among the people whose participation is essential to a healthy political system. It is of vital importance, therefore, that means be devised to give to candidates and committees freedom from pressures or influence.

Hearings on S.3496 Before the Senate Committee on Finance, 89th Cong., 2d Sess. 31 (1966) (statement of Sen. Cannon).

Congressional debate discloses the major objectives which the 1966 Act was intended to serve: removing the potential for possible improper influence in government, 112 Cong. Rec. 28,248 (1966) (remarks of Rep. Mills), 112 Cong Rec. 28,765 (1966) (remarks of Sen. Long); stimulating individual interest in politics and broadening the base for individual participation in political campaigns, 112 Cong. Rec. 28,249 (1966) (remarks of Rep. Mills); permitting elected officials to remain "free from suspicion that some one individual or some segment of the economy with an ulterior motive had come in and contributed a large sum of money and made it possible, because of that contribution, to influence the outcome of an election." 112 Cong. Rec. 28,779 (1966) (remarks of Sen. Smathers). As one of the 1966 Act's leading opponents, Senator Gore, recognized:

> The root of corruption in politics is money and the love of power. The means by which the public will is frustrated is money. The means by which elections are manipulated, and contrived, and distorted

> is money and power . . . . Money threatens to destroy our democratic processes.

112 Cong. Rec. 13,544 (1966) (remarks of Sen. Gore).

Opponents of the 1966 Act, while aware of the need for urgent reform, were concerned that the proposal did not go far enough to provide sufficient safeguards for the purposes for which it was intended. In their estimation, the 1966 Act "[did] not inhibit [the] corrupt[ing] influences [of money], [did] not bring its use to public attention, [did] not limit its influence, [nor] regulate its movement and source." 112 Cong. Rec. 13,544 (1966) (remarks of Sen. Gore). The perceived lack of necessary controls over the raising and spending of private monies by committees in political campaigns did little to alleviate the greatest danger to the democratic elective process, the *quid pro quos*. 112 Cong. Rec. 28,083 (1966) (remarks of Sen. Gore). Opponents strenuously argued that without such controls the proposal could not assure that the presidential candidate who received public funds still would not be subject to the possible improper influence by those who would contribute in other ways to his or her campaign.

The lack of safeguards against the increased use of wealth, necessary to protect the elective processes from the "improper use of money, sometimes in excessive amounts," expended "in favor of special interest candidates," 112 Cong. Rec. 28,781 (1966) (remarks of Sen. Gore), was a major factor which led to the defeat of the 1966 Act. Indeed, without more, opponents feared that the Long Plan would merely be a subsidy and add "federal tax money . . . to what is otherwise available [and] increase rather than decrease the influence of money in federal elections." 112 Cong. Rec. 28,083 (1966) (remarks of Sen. Gore). *See also* 113 Cong. Rec. 8060 (1967).[16]

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[16] Congress also debated the apparent serious constitutional questions about the formula used to identify the eligible candidates, the practical effect being to exclude candidates who did not represent the two major parties. *Id. See also* 113 Cong. Rec. 8061 (1967) (remarks of Sen. Gore).

Debate over the 1966 Fund Act continued in 1967. During the debate, numerous amendments to the Long Plan were proposed to meet the objectives and concerns presented by opponents of the Plan, with the hope of avoiding repeal. Opponents of the Plan restated their position that the 1966 Act still did not go far enough to curb potential abuses. The most serious flaw was its failure to limit the "raising and spending of private funds on behalf of presidential candidates or any other candidates." Thus, "national fundraising drives [could] continue as before and the proceeds [could] be spent as they [had] been spent in the past." 113 Cong. Rec. 8063 (1967) (remarks of Sen. Gore). *See also* 113 Cong. Rec. 8304 (1967) (remarks of Sen. Gore).[16] Indeed, with regard to control of spending on behalf of federal candidates, Senator Gore observed:

> A candidate may not control . . . independent committees . . . There is no limit in the present law on the amount of money they can collect or spend. There is no limit provided by the pending amendment. The amendment . . . is unworkable. It does not include individuals at all. It could not, because of the constitutional provision against limitation on freedom of speech.

113 Cong. Rec. 9386 (1967) (remarks of Sen. Gore). Thus, on April 13, 1967, Congress voted to adopt an amendment which repealed the 1966 Fund Act. 113 Cong. Rec. 9397 (1967).

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[16] Indeed, Senator Long, admitting that his proposal was not perfect, characterized his Plan as a positive and necessary first step toward remedial campaign reform:

> I started out with the theory that by providing adequate financing for both major party candidates for President of the United States, we would eliminate the necessity of either of those candidates having to seek or accept any private contribution which might in any way tend to prejudice or even cast the suggestion of prejudice upon the activities and conduct of such candidate, should he be elected President of the United States. . . .

113 Cong. Rec. 8295 (1967) (remarks of Sen. Long).

Firm in the belief that campaign reform legislation was urgently needed in the electoral process, Senator Long, in 1967, supported by proponents of public financing, introduced the Honest Election Act of 1967, Amendment No. 167, on April 18, 1967. 113 Cong. Rec. 9978 (1967). Extensive Senate debate over the newly proposed Honest Election Act raised numerous objections. Viewed as an attempt to reenact the 1966 Act, the 1967 Act presented similar problems:

> There [was] no real effective prohibition against privately financed expenditures, even for the purpose listed in the amendment . . . . *The pending amendment contain[ed] no limit whatever on the amount that may be raised and spent from private sources in the conduct of a presidential election. . . . There would still be no effective limit on how much could be given, how much could be received, how much could be spent, for what it could be spent, or when it could be spent.* . . .

113 Cong. Rec. 10,201 (1967) (remarks of Sen. Gore) (emphasis added). Therefore, all that would be accomplished by the enactment of the 1967 Act would be to provide public funds to each major party for use in addition to whatever amounts could be raised privately. Critics of the 1967 Honest Election Act prevailed and the proposal was defeated. 113 Cong. Rec. 12,169 (1967). It was not until 1971 after years of protracted debate on the details of various provisions and continued investigation that Congress finally enacted reform legislation for presidential elections.

With the enactment of the 1971 Fund Act, a majority of the Congress concluded that the idea of public financing, which had been debated extensively throughout the twentieth century, was necessary to protect the presidential election process. Indeed, a majority of the Congress reaffirmed earlier determinations that public financing would foster public confidence and participation in the electoral process by "eliminat[ing] a source of public suspicion about government." 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Hart). By remov-

ing private money and providing total public financing for presidential elections, the vital independence of the president would be preserved; the president would no longer be "beholden" to but free of special interests; and the pressure of money to control decisions of those elected would be eliminated. 117 Cong. Rec. 41,937, 41,938 (1971) (remarks of Sen. Mansfield). The advent of public financing would free the candidates from their "heavy depend[ence] on 'interested' givers who expect a return on their investment, usually in the form of some governmental favor or largesse." New York Times, June 11, 1971 at 35, col. 5, *reprinted in* 117 Cong. Rec. 41,779 (1971). *See also* 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Cranston).

B. Section 9012(f) Is Necessary To Preserve The Integrity Of The Presidential Election Campaign Fund Act.

The public financing scheme rests on the eligibility requirements and expenditure limitations. In order to become an "eligible candidate" under the Fund Act, 26 U.S.C. § 9002(4), the individual must certify that he or she: has not and will not accept any private contributions; will adhere to an expenditure limitation; will maintain and furnish to the Commission, when requested, materials pertaining to the candidate's qualified campaign expenses; will submit to an audit and examination by the Commission after the election; and will make whatever repayments are required by the Commission. 26 U.S.C. § 9003. The candidate must also be the presidential nominee of a major party, as defined in 26 U.S.C. § 9002(6).[17] If these conditions are satisfied, and if the candidate so chooses, the candidate will receive $20,000,000 plus an adjustment for inflation, to defray all

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[17] A candidate of a minor or new party, as defined by 26 U.S.C. § 9002(7) and (8), may establish eligibility to receive public funds pursuant to the formula set out at 26 U.S.C. §§ 9004(a)(2) and (3), 26 U.S.C. 9003.

general election campaign expenses. 26 U.S.C. § 9004 (a) (1).[18]

Candidates who opt to receive public funds "must pledge not to incur qualified campaign expenses" in excess of the amount of public monies received under the Fund Act. 26 U.S.C. §§ 9003(b) (1), 9004(a) (1), and 9007(b); 2 U.S.C. § 441a(b) (1) (B).[19] Publicly financed candidates are prohibited from accepting any form of private financing to augment the public monies received and spent on behalf of their campaigns other than to compensate for deficiencies in the fund. 26 U.S.C. §§ 9003(b) (2), 9007(b) (3), and 9012(b) (1). The foregoing restrictions are in harmony with the conclusion that, "the public interest purposes behind the decision of Congress to provide for the financing of presidential elections would hardly be served unless some reasonable limits and conditions were imposed."[20] *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 285 (S.D.N.Y. 1980) (three judge court), 616 F.2d 1 (2d Cir. 1980) (en banc) (per curiam), *aff'd mem*, 445 U.S. 955 (1980) (*"Republican National Committee"*).

Of equal importance to this comprehensive legislative scheme is § 9012(f), the provision challenged herein, which permits political committees not authorized by the

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[18] The public allotment for the 1980 election was $29.4 million dollars per major-party candidate.

[19] Criminal penalties may be imposed on candidates who knowingly and willfully incur expenses in excess of their allotment. § 9012(a).

[20] Where congressional spending furthers first amendment values, as does public financing, *Buckley*, 424 U.S. at 93, Congress's power to condition its terms is quite extensive. *Republican National Committee, supra; American Communications Association* v. *Douds*, 339 U.S. 382, 417 (1950) (Frankfurter, J., concurring); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (1947). *See Wyman* v. *James*, 400 U.S. 309 (1971); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 486 (1970); *Flemming* v. *Nestor*, 363 U.S. 603 (1960).

candidate to spend up to $1,000[21] to defray what would otherwise be qualified campaign expenses. The provision's background manifests congressional belief and determination that the public financing scheme required a limitation on the amount which unauthorized political committees could spend to further the election of publicly funded candidates. Congress concluded that § 9012(f) was necessary to prevent unauthorized committees from supplementing the almost 30 million dollars a presidential candidate would receive from the federal campaign fund.[22] Clearly, unlimited spending by these unauthorized committees to defray what would otherwise be qualified campaign expenses on behalf of publicly funded candidates is inconsistent with the will of Congress. *See* discussion, *supra* at 12-18, *infra* at 22-23.[23]

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[21] No political committee may inadvertently violate the § 9012(f) expenditure limitation. Criminal penalties attach only for knowing and willful violations of the subsection.

[22] Indeed, during the 1980 presidential election campaign, independent expenditures for publicly funded candidates totalled approximately $11.5 million. *See Data* at VII.

[23] Congress understood that unauthorized independent political committees raising large amounts of contributions and using this aggregated wealth to defray qualified campaign expenses on behalf of presidential candidates presented similar dangers of *quid pro quos* and the appearance of corruption which surround large contributions to presidential candidates. Spending by unauthorized political committees on behalf of presidential candidates has increased dramatically during the past four years. Congress concluded that without § 9012(f) such spending would continue to rise, bringing with it the very cloud of suspicion over the presidential campaign that the Fund Act was designed to dispel. The power and influence that these committee leaders could exert or appear to exert over the particular presidential candidate will once again cause the deterioration of public confidence in their elected officials and again have the potential to reduce individual participation in the electoral process, consequences Congress sought to avoid. *See Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). Indeed, this Court has held that the Fund Act, insofar as it eliminates the appearance of corruption, promotes a compelling governmental interest. *Buckley*, 424 U.S. at 91, 95; *Republic National Committee*, 487 F. Supp. at 285, *aff'd mem.*, 445 U.S. 955 (1980); *see* discussion, *infra* at 33-40.

Section 9012(f) did not go unchallenged in the Senate. Indeed, Congress "struggled" with all of the provisions involving campaign expenditure limits to arrive at a "reasonable" balance. 117 Cong. Rec. 42,627 (1971) (remarks of Sen. Pastore and Sen. Long).[34] Proposed amendments to § 9012(f) would have broadened the scope of its coverage. An amendment proposed by Senator Miller and subsequently passed by the Senate, 117 Cong. Rec. 42,626 (1971), made it a "knowing and willful violation" for individuals to spend more than $1,000 during the general election campaign. And an amendment proposed by Senator Cook would have limited to $1,000 spending by *individuals* "absolutely independent of the candidate." 117 Cong. Rec. 42,626 (1971) (remarks of Sen. Pastore).[35]

Strenuous objections, founded on constitutional grounds, were voiced by Senators Long and Pastore. With the passage of the Miller amendment and possible passage of the Cook amendment, these Senators feared that "nobody [could] do anything" at all in the general election,

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[34] Candidates opting for public funding of their campaigns would be limited to a designated amount of public funds to defray qualified campaign expenses, individuals unable to contribute to such candidates would be free to make unlimited independent expenditures during the general election campaign, and unauthorized political committees would be limited to expenditures of $1,000, received from individual contributions. To sever one of the limitations would upset this balance. *See Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932) *cited in Buckley*, 424 U.S. at 108-9.

[35] Other proposals would have strictly limited private spending and public discussion. Indeed, concerns over the circumvention of the overall candidate expenditure limitation and of the ban on spending by corporations and labor organizations prompted Senator Taft to propose an amendment which would have deleted the term "political committee" from § 9012(f) and substituted in lieu thereof "any corporation, labor organization, partnership, association, political committee, political education committee or any other committee." *See* 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Taft). (1971). After full debate, the measure was rejected. *See* 117 Cong. Rec. 42,402 (1971).

"even on an individual basis." 117 Cong. Rec. 42,626 (1971) (remarks of Sen. Long). Such a provision might raise a constitutional challenge as a direct impingement on the individual's first amendment right of free speech. *Id.* at 42,627. The Cook amendment was subsequently rejected by the Senate, 117 Cong. Rec. 42,627 (1971) and the Miller amendment was finally stricken from the Fund Act in Conference.

Section 9012(f) was the narrowly drafted compromise to address important governmental interests while protecting the individual's right to directly participate in the electoral process. Senator Taft stated that such a provision would "prevent any political committees from being formed as a subterfuge so that they can go beyond the authorization of the committees and make expenditures that were not within the limitations of the expenditures which are in the bill." 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Taft). *See* 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Taft) (". . . this language is necessary purely to accomplish the purpose of this bill."); 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Cranston) ("The amendment could at painfully long last, liberate American political parties from financial dependence on big money, big pressure groups and big spenders of all kinds. . . .").[26] *See also* 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Hart). Section 9012(f) was thus rooted in Congress's wise, indeed expert, assessment of the potential danger of *quid pro quos* in allowing political committees to dominate presidential campaigns, spending vast sums of money to secure the election of presidential candidates.[27]

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[26] Indeed, without § 9012(f) Congress understood that political committees would be able to avoid the Fund Act's limitations and expend unlimited amounts of private monies on behalf of publicly financed candidates.

[27] And as this Court has acknowledged, the risk that presidential candidates may become, or even appear to be, beholden to these private benefactors is the precise evil which the Fund Act

Concluding that some limit on expenditures by unauthorized committees was necessary to preserve the integrity of the public financing system, Congress determined that a limitation of $1,000 would best serve this purpose. Well aware of the high cost of federal campaigns, Congress acknowledged that "when you incur an expense to promote the candidacy of a presidential candidate, $1,000 is small." 117 Cong. Rec. 42,399 (1971) (remarks of Sen. Pastore).[28] Nevertheless, Congress concluded that permitting unauthorized political committees to spend up to $1,000 to defray what would otherwise be qualified campaign expenses was necessary to avoid the deleterious influence of "big money" in presidential election campaigns, and to prevent the circumvention of the expenditure limitations, while protecting first amendment rights.[29]

In the ten years since congressional enactment of the Fund Act and the five years since *Buckley*, *supra*, Congress's judgment has proven correct. Assessment of the role of independent expenditures has drastically changed

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sought to eradicate. *Buckley*, 424 U.S. at 91, 96; *Republican National Committee*, 487 F. Supp. at 284, *aff'd mem.*, 445 U.S. 955 (1980).

[28] The choice of that figure is a permissible legislative judgment requiring the deference of this Court. As Mr. Justice Holmes argued more than fifty years ago:

> . . . when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Louisville Gas Co. v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting); *Burroughs* v. *United States*, 290 U.S. at 547. *See also Marchioro* v. *Chaney*, *supra*; *Buckley*, 424 U.S. at 13 n.16. A conclusion that the $1,000 ceiling is too low, imposing an undue burden on first amendment rights, does not require that the concept of § 9012(f) be held unconstitutional. *Buckley*, 424 U.S. at 83.

[29] Congress is fulfilling a public trust by ensuring that the monies directed by the taxpayers to the public fund are in fact accomplishing the purposes of the fund. *See Wyman* v. *James*, 400 U.S. at 318-19 ("The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust).

from "independent expenditures [may become] one of the most important elements in a changing political process," [30] *Buckley*, 424 U.S. at 46, to "this big money casting a dark cloud over the integrity of the American political system will become a great issue and the American people will demand a stop to it." [31] Today, the real possibility of a *quid pro quo* arises not from the "small voices" of contributors but from those limited number of political committee decisionmakers who determine where and when each committee's resources will be allocated.[32] The collectors of contributions have replaced the givers of contributions as the source of actual or apparent corruption.[33]

Commission figures indicate that at least $9 million in independent expenditures were made on behalf of the Republican presidential candidate in the 1980 general election. *Data* at 334.[34] In contrast, $1,646,540 in independent expenditures were spent for or against publicly financed presidential candidates in the 1976 general election. The bulk of the money spent in 1980 came from

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[30] An Analysis of the Impact of the Federal Election Campaign Act, 1972-78, Final Report to the Committee on House Administration by the Campaign Finance Study Group, the Institute of Politics, Harvard University 5-12 (May 1979).

[31] News Comments of Vice President Walter F. Mondale—St. Paul, Minnesota—November 5, 1980.

[32] *See* FEC J.S. at 27.

[33] *United States* v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* (UAW-CIO), 352 U.S. 567 (1957); *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948). This Court recognized the compelling need to prevent the aggregated wealth of large special interest groups from improperly influencing the outcome of federal elections. *See also United States* v. *CIO*, 335 U.S. at 145, 146 (Rutledge, J., concurring).

[34] The experience of the 1980 presidential election provides information which was not before the lower court because of the timing of the lawsuit but which is indispensible to a determination as to the validity of § 9012(f).

five non-party connected political action committees: the Congressional Club—$3,358,796, *Data* at 148; NCPAC—$2,102,301; *Data* at 184; FCM—$1,772,535; *Data* at 222; AEP—$1,270,208, *Data* at 224; and AFC—$711,856, *Data* at 230. The decisionmaking process of the five committees is composed of party and political professionals.[35] Surely, it would be "naive to think that these types of political activities are motivated at these levels by some academic interest in 'democracy' or other public service impulse." *Elrod* v. *Burns*, 427 U.S. 347, 385 (1976) (Powell, J., dissenting). Such facts are not lost on the voting public. Indeed, the Washington Post recently reported that:

> White House political advisor Lyn Nofziger yesterday defended the activities of groups such as the National Conservative Political Action Committee (NCPAC) saying that they create "a climate of doubt" about Democrats and are "on balance" a help to the Reagan administration. "I have a feeling that you have to go out and establish the negatives," Nofziger said.

Washington Post, May 5, 1981, at A3, col. 1.

Thus, money that a candidate could spend to communicate a message to the voters must now be spent in answering not the charges of an opponent but attacks by politi-

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[35] The Congressional Club has as its honorary chairman Senator Jesse Helms of North Carolina. Senator Helms stated that while the Committee was independent of the Reagan campaign, such an arrangement has made it awkward to communicate with the candidate: "I've had to, sort of, talk indirectly with Paul Laxalt (the national chairman of the Reagan campaign). I hope that he would pass along, uh, and I think the messages have gotten through all right." New York Times, September 22, 1980, A26, col. 2. In New Hampshire, FCM "pumped in sixty thousand dollars worth of newspaper ads when the group learned through the media that Reagan was in trouble." ABC News Nightline, July 7, 1980. *See also* The Boston Globe, February 5, 1981 at 13, col. 1. AFC has a "steering committee that includes 63 corporate executives, 34 retired House members, 5 Senators (3 retired), 10 retired governors and 5 former ambassadors." National Journal, September 13, 1980 at 1515. Similarly, AEP is "laden with former officials from the Ford and Nixon Administration." *Id.*

cal committees responsible to no one, not even to their own contributors. The amounts which appellee political committees hoped to spend to further the election of one candidate are enormous by any standard. AFC hoped to raise and spend twenty to thirty million dollars; AEP, twelve to fifteen million; and FCM, three to ten million.[36] The potential total of fifty-five million dollars is nearly twice the amount a publicly funded candidate is allowed to spend. Although appellee committees fell short of their dential election will be awash in expenditures by unauthorized political committees is very real. Paul Wilson, media advisor for AEP, views independent expenditure committees as the wave of the future. Mr. Wilson predicts that:

> . . . if we don't do anything by 1982 and certainly by 1984, there are going to be literally hundreds of independent expenditure committees that will raise funds independently broadcasting messages, in some cases, without any control by the candidates and campaign staff and in some cases merely pocketing the money. So if we do nothing it is going to explode.

Presentation by Paul Wilson, *FECA: After a Decade of Political Reform, A National Conference by Citizens' Research Foundation* (April 3, 1981).

Moreover, whatever the outcome of the debate among political scientists and the media as to the actual effectiveness of independent expenditures, the public percep-

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[36] By comparison, each political party is limited to expenditures totalling $4.7 million in support of the party's presidential candidate. *See* discussion, *infra* at 44-45. All registered political party committees at the National, State, and local level itemize "441a(d)" expenditures, made on behalf of federal candidates, on reports filed with the FEC. Reports filed for the 1979-80 election period disclose the following: Democratic party committee § 441a(d) expenditures totalled approximately $4.7 million for all federal candidates with 73% expended on the presidential campaign; Republican party committee § 441a(d) expenditures totalled approximately $11.7 million for all federal candidates with 39% expended on the presidential compaign.

tion of independent expenditures is that they are of value to the candidates and that thus the candidate will feel grateful to those groups making the expenditures.[37] The public hears James Baker, III, political strategist for the Regan campaign and now White House Chief of Staff observe that: "[t]here's some risk they'll get out there and be so negative that it would be counterproductive. On the balance, though, we would probably rather see the expenditures be made." Newsday, September 28, 1980 at 25, col. 3. The public reads of Richard Viguerie, co-founder of NCPAC, meeting with President Reagan at the White House and commenting afterwards that "[w]e're making some progress" adding "[w]e'll be keeping the pressure on."[38] A voting public scarred by past electoral abuses and reflecting a healthy skepticism of the intentions of professional politicians, must question whether a *quid pro quo* arrangement has been struck. With section 9012(f), Congress determined in advance that this question should not and need not even be asked. Congress's judgment should be affirmed to preserve the stated purposes of public funding and to protect the integrity of the electoral process.

C. Section 9012(f) Is Entitled To A Presumption Of Constitutionality.

Congressional enactments such as the Fund Act come to the Court under the presumption of constitutionality. *Flemming* v. *Nestor*, 363 U.S. at 617. Further, legislative findings by the Congress upon which the legislation rests are accepted by the courts unless irrational or unreasonable. *See, e.g., McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153 (1938). Indeed, faced with first amendment challenges regarding the regulation of advertising space in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298,

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[37] Both the Democratic and Republican National Committees, however, have been critical of such expenditures. The Washington Star, May 6, 1981, A6, col. 1.

[38] Knight Newspapers, February 18, 1981, *cited in* The American Political Report, Vol. X, No. 12, February 27, 1981 at 1.

303, 304 (1974), this Court questioned whether the policies and practices were "arbitrary, capricious, or invidious" and concluded that the city had advanced 'reasonable legislative objectives.'" Emerson, First Amendment Doctrine and the Burger Court, 68 Cal. L. Rev. 422, 442 (1980); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). *See also Fullilove* v. *Klutznick*, —— U.S. ——, 100 S.Ct. 2758 (1980); *California* v. *LaRue*, 409 U.S. 109 (1972); *United States* v. *Robel*, 389 U.S. 258, 271, 285 (1967) (Brennan, J., concurring; White and Harlan, J.J., dissenting); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94-95, 169-70 (1961).[39]

Moreover, this Court has declared that:

> The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of the means to that end presents a question primarily addressed to the judgment of Congress.

Burroughs v. *United States*, 290 U.S. at 547 (1934). *See also Marchioro* v. *Chaney*, *supra*; *Buckley*, *supra*. To that end, Congress chose public financing as the means to encouraging individual participation in the electoral process. *See* 117 Cong. Rec. 41,775 (1971) (remarks of Sen. Pastore); 117 Cong. Rec. 41,937 (1971) (remarks of Sen. Mansfield); 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Hart); 117 Cong. Rec. 42,397 (1971)

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[39] By analogy, in upholding congressional enactments under the Commerce Clause and Section 5 of the fourteenth amendment the Court has consistently held that it is for Congress to determine the facts and weigh the various considerations, subject only to a requirement of rationality. *Oregon* v. *Mitchell*, 400 U.S. at 133, 248 (opinions of the Court and of Justices Brennan, White and Marshall dissenting); *Katzenbach* v. *Morgan*, 384 U.S. 641, 653, 656 (1966); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258, 261-62 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-04 (1964). The same rule applies under the Due Process Clause. *McClean* v. *Arkansas*, 211 U.S. 539, 550-51 (1909); *Munn* v. *Illinois*, 94 U.S. 113, 125 (1877).

(remarks of Sen. Taft).[40] Such congressional appraisal of the need for the Fund Act's limitations rests on a solid foundation of experience and protracted debate. Congress's judgment is indeed reasonable and entitled to deference.

Although the court below chose to ignore such legislative findings dating back to 1907, the legislative history clearly establishes that the statutory provisions

> did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted first in the fair and open field of debate . . . and being supported by arguments which convinced minds as . . . intelligent as this country can boast, it became a law. . . .

McCulloch v. *Maryland*, 4 Wheat. at 420. Indeed, as reiterated recently by this Court, "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation," *State of Minnesota* v. *Clover Leaf Creamery Co.*, —— U.S. ——, 101 S.Ct. 715, 726 (1981) *citing Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). *See also Buckley*, 424 U.S. at 260. (White, J., concurring in part and dissenting in part.) Even in the first amendment area, this Court has declared that "the judgment of the Legislative Branch cannot be ignored or under-valued simply because one segment . . . casts its claim under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. at 103. *See also Fullilove* v. *Klutznik*, *supra*. Rather, when faced with a "complex problem with many hard questions and few easy answers," the Court does "well to pay careful attention to how the other branches of government have addressed the same problem," and how Congress has examined legislative developments. *Id.* Indeed, it is the Congress which has the resources and the power to inform itself and is the appropriate forum where the conflicting pros and cons are presented and considered. *United States* v. *Robel*, 389 U.S. at 276.

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[40] This court has long recognized that so long as the goals of congressional legislation are constitutional, the manner and means

To "accept the judgment of Congress as to what legislation is appropriate" does not involve a "surrender of the Court's function as ultimate arbiter in disputes over interpretation of the Constitution." *Welsh* v. *United States*, 398 U.S. 333, 371 (1970) (White, J., dissenting). However, in the words of Mr. Justice Frankfurter, even first amendment

> cases are not an exception to the principle that we are not legislators, that direct policymaking is not our province. How best to reconcile competing interests is the business of legislators, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

Dennis v. *United States*, 341 U.S. 494, 539-40 (1951). (Frankfurter, J., concurring).[41] Congress has spoken; its judgment should be affirmed.

II. THE DISTRICT COURT HELD UNCONSTITUTIONAL AN INTEGRAL PROVISION OF THE PRESIDENTIAL ELECTION CAMPAIGN FUND ACT WITHOUT REGARD TO CONGRESS'S JUDGMENT AS TO ITS NECESSITY AND AS TO ITS CONSTITUTIONALITY.

The district court, however, failed to give even cursory consideration to the seventy year history of campaign reform legislation aimed at bringing meaningful reform to the area of financing presidential election campaigns. Indeed, the lower court's sole reference to legislative history in the course of its twenty-seven page slip opinion is

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for obtaining those goals are deemed legitimate. If the end is legitimate and constitutional, "all means . . . which are plainly adopted to that end, which are not prohibited", but are in the "spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. at 421.

[41] And in the words of Mr. Justice Holmes, when a legislature "has intended its will . . . that will should be recognized and obeyed." *Johnson* v. *United States*, 163 F. 30, 32 (1st Cir. 1908). *Cf., Landmark Comm. Inc.* v. *Virginia*, 435 U.S. 829 (1978).

contained in a two and one-half line footnote regarding a jurisdictional provision of the Fund Act. *See* FEC J.S. App. A at 30a, n.50.[42] The district court did not explain why it chose to ignore the legislative determination that a limitation on the amount which unauthorized political committees could spend to further the election of publicly funded candidates is an essential component of the public financing scheme.[43] It seems clear, however, that the court below disregarded this determination and rendered its decision absent adequate attention to the legislative concerns that have characterized Congress's seventy year attempt to eliminate the dangers of real or apparent corruption in connection with presidential election campaigns.

The district court deemed 26 U.S.C. § 9012(f) not necessary to prevent real or apparent corruption, thus failing to serve a compelling interest. FEC J.S. App. A at 21a. The court thus rejected expert congressional assessment of the potential danger of allowing political committees to amass, control and spend vast sums to influence the election of publicly financed presidential candidates. Rather, the court found, as a matter of law, that such "political committees cannot wield [a] *Quid Pro Quo*." *Id.* The court decided that appellee political committees[44] are "simply 'pooling agents' for many small

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[42] The court correctly relied on the legislative determination that the purpose of § 9011(b) was to authorize federal courts to expeditiously hear and decide actions brought to implement or construe the Fund Act. The court nowhere made clear why inquiry into the legislative purpose was appropriate with regard to § 9011(b) but inappropriate with regard to the constitutionality of § 9012(f), a central feature of a significant Act of Congress.

[43] By holding invalid § 9012(f) the lower court may have produced a statute which will ultimately operate contrary to congressional intent. *See, e.g., Buckley*, 424 U.S. at 235-36 (Burger, C.J., dissenting).

[44] To be sure, the definition of "political committee" is well-accepted and survives a vagueness argument. Both the court of appeals in *Buckley* v. *Valeo*, 519 F.2d 821, 901 (D.C. Cir. 1975), and this Court, 424 U.S. at 79, upheld the constitutionality of these definitions against plaintiffs' vagueness challenge.

voices." FEC J.S. App. A. at 17a. Apparently, as its premise, the court believed that these "pooling agents" would merely, as a public service to the individual contributors it seems, lend a "professional touch" to "political speech common to *all* of the member-contributors." FEC J.S. App. A at 19a (emphasis added). The court cites no support for these conclusions. Nor does the court point to any empirical data to substantiate its questionable premises. In sum, the court below struck down a congressional judgment in the area of electoral reform by substituting its own speculations as to the realities of political life.

It is clear that deference to congressional judgment is appropriate in "the political arena where the expertise of legislators is at its peak and that of judges is at its very lowest." [45] The lower court's foray into the largely unfamiliar territory of the political process without the benefit of legislative guidance attests to the sagacity of that statement.[46] The case before this Court is not one in which "the history", in the words of Mr. Chief Justice

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[45] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 804 (1978) (*"Bellotti"*) (White, J., dissenting). *See also Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). *See also* discussion *supra* at 13-24.

[46] The opinion of the court below was filed by Judge Wilkey. In the context of another election law case, it was Judge Wilkey who recognized that:

> The penchant of this court to give no deference whatsoever to the responsible agency's interpretation of its role and basic statute has been noted with acerbity by the Supreme Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) . . .

Democratic Senatorial Campaign Committee v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 51,053 at 51,060 n.2 (D.C. Cir. October 9, 1980) (three-judge court) (Wilkey, J., dissenting), *probable jurisdiction noted* in No. 80-939 (March 2, 1981). Clearly, if deference to the responsible agency's interpretation of the statute is desirable, deference to the legislature is required.

Warren, is "inconclusive."[47] The district court's finding that § 9012(f) exceeded constitutional limitations, without regard to the extensive congressional debate to the contrary, must be reversed.

III. THIS COURT'S PRIOR DECISIONS SUPPORT THE CONSTITUTIONALITY OF § 9012(f).

This Court has held constitutional other expenditure limitations enacted by Congress to protect the integrity of public financing of presidential elections. *Republican National Committee, supra*; *Buckley, supra*. These cases accorded constitutional significance to the distinction which Congress drew between a person spending money directly for speech and a person giving money to a political committee to be spent for speech. *See also California Medical Association* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 (9th Cir. May 23, 1980), *possible jurisdiction postponed* No. 79-1952 (October 6, 1980); *Mott* v. *Federal Election Commission*, 494 F. Supp. 131, 137 (D.D.C. 1980), *appeal docketed*, No. 80-1949 (D.C. Cir. Aug. 12, 1980), *appeal docketed*, No. 80-2069 (D.C. Cir. Sept. 4, 1980) (distinction drawn between direct and indirect expression).

In *Buckley*, this Court reviewed challenges to the constitutionality of various provisions of the Federal Election Campaign Act and of the Presidential Election Campaign Fund Act.[48] As to challenges to the Fund

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[47] *Brown* v. *Board of Education*, 347 U.S. 483, 489 (1954).

[48] The Federal Election Campaign Act of 1971 ("the Act" or "FECA"), Pub. L. No. 92-225, 86 Stat. 3, was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; by the Federal Election Campaign Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1655; and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. The relevant provisions of the Act are codified in Title 2 of the United States Code. As discussed, *supra*, the Presidential Election Campaign Fund Act ("the Fund Act") was enacted in 1971, Pub. L. No. 92-178, 85 Stat. 573 (1971).

Act, this Court found no merit in claims that the challenged provisions of the Fund Act violate either the first or the fifth amendment. *Buckley*, 424 U.S. at 86.[49] Although the Court invalidated expenditure limitations found in FECA because they did not serve the "substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," 424 U.S. at 48, all challenged expenditure limitations in the context of publicly financed campaigns were upheld.[50]

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[49] 26 U.S.C. § 9012(f) itself was not challenged in *Buckley, supra*, and the Court rejected as unripe challenges to other subsections of 26 U.S.C. § 9012. *See*, Answers to Certified Questions, 424 U.S. at 143 n.178, *aff'g* 519 F.2d at 898-900.

[50] Similarly, FECA's prohibition on the use of corporate treasury funds to make independent expenditures in connection with federal elections, 2 U.S.C. § 441b, has been held constitutional by numerous fededal courts. *Federal Election Commission* v. *Lance*, 635 F.2d 1132 (5th Cir. 1981) (en banc); *Bread Political Action Committee* v. *Federal Election Commission*, 635 F.2d 621 (7th Cir. 1980), (en banc), *appeal docketed* No. 80-1481 (March, 1981); *California Medical Association* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 (9th Cir. May 23, 1980), *possible jurisdiction postponed* No. 79-1952 (October 6, 1980); *United States* v. *Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973); *United States* v. *Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *Federal Election Commission* v. *National Right to Work Committee*, 501 F. Supp. 422 (D.D.C. 1980), *appeal docketed*, Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association*, 239 F. 163 (W.D. Pa. 1916). And this Court has avoided any judgment on the constitutionality of § 441b, while recognizing Congress's right to evaluate the need for remedial legislation to protect the integrity of the federal election process. *See Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972); *United States* v. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* (UAW-CIO), *supra; United States* v. *Congress of Industrial Organizations, supra.*

Preliminarily, the Court found that "public financing of Presidential elections as a means of reforming the electoral process" was a legitimate choice made by Congress pursuant to its power to legislate for the "general welfare." *Buckley*, 424 U.S. at 90; United States Constitution, art. 1, § 8, cl. 2. Accordingly, the Court upheld Congress's choice of prior election vote totals to determine candidate eligibility. *Buckley*, 424 U.S. at 97. This Court noted:

> Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political affairs. We cannot say that Congress' choice falls without the permissible range.

424 U.S. at 104.[81] Moreover, the Court in *Buckley* specifically held that its holdings invalidating FECA's expenditure limitations did not "require the conclusion that [public financing of presidential campaigns] is unconstitutional."[82]

In *Republican National Committee, supra*, this Court affirmed the conclusion of the United States Court of Appeals for the Second Circuit (en banc) and the three-judge court convened pursuant to 26 U.S.C. § 9011(b) that public financing of presidential campaigns does not violate the first amendment rights of either a publicly

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[81] The Court similarly upheld the 10-state requirement for eligibility for presidential public funding, *Buckley*, 424 U.S. at 104 n.140; public funding of party conventions, 424 U.S. at 104, and primary election campaign financing, 424 U.S. at 105. *See also Gelman* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 at 51,021 n.13 (D.C. Cir. July 18, 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 219 (1980). Section 9012(f) itself serves to guard against factionalism and splintering of the political party system. *See* discussion, *infra* at 38-40.

[82] Recognizing that "the expenditure limitations accepted by a candidate to be eligible for public funding are identical" to "the FECA expenditure limits, the Court had "no difficulty in concluding" that the public financing provisions were severable and constitutional. *Buckley*, 424 U.S. at 108.

funded candidate or the candidate's supporters. 487 F. Supp. at 284. Acceptance of public financing being voluntary, the court held that

> The supporters may not complain that the government has deprived them of the right to contribute. . . . As in *Marchioro* v. *Chaney*, 442 U.S. 191, 99 S.Ct. 2243, 22848, 60 L.Ed. 816 (1979), the complaint of the contributors should be addressed to the candidate who has chosen to forego private financing, rather than to the court.

487 F. Supp. at 286, *aff'd mem.*, 445 U.S. 955 (1980).[53]

Thus, this Court has reviewed the expenditure limitations which Congress included in the Fund Act on two occasions. On both occasions, all expenditure limitations were held constitutional. *Republican National Committee, supra*; *Buckley, supra.* Correct application of the principles of these cases requires a finding that 26 U.S.C. § 9012(f) is also constitutional. The district court's finding to the contrary is inconsistent with this Court's prior rulings in cases directly on point.

Moreover, the district court's conclusion represents a serious misapplication of this Court's statement in *Bellotti, supra*, that free expression may not be limited on the basis of the "identity of its source, whether corporation, association, union or individual." *Id.* at 777.[54] Contrary

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[53] The court also noted the many options available for individual support of a candidate in a publicly financed campaign, 487 F. Supp. at 286, *aff'd mem.*, 445 U.S. 955 (1980), and recognized that this Court in *Buckley* held the Fund Act constitutional. In *Buckley*, this Court stated:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding.

Buckley, 424 U.S. at 57 n.65.

[54] The statute reviewed in *Bellotti* is critically different from § 9012(f). *Bellotti* involved a statute which banned entirely certain corporate expenditures, 435 U.S. at 767-768, while § 9012(f) merely limits the amount which political committees may spend

to the district court's apparent assumption, *Bellotti* did not hold that corporations or any other artificial entities (such as political committees) are entitled to the same protection under the first amendment as are natural persons. 435 U.S. at 775-776. Rather, this Court in *Bellotti* recognized that the first amendment is primarily designed to protect individual self-expression [55] from governmental intrusion and to ensure that the rights of hearers to open and informed discussion are not unnecessarily abridged. 435 U.S. at 783. *See also* 435 U.S. at 804, 807 (White, J., dissenting). As previously discussed, public financing of presidential elections was specifically designed by Congress to promote individual participation in the federal election process and to provide adequate funding so that presidential candidates can devote the majority of their energies to the discussion of issues with the electorate. *See* discussion, *supra* at 12-18. Section 9012(f) itself does nothing to prevent any individual or group of individuals from voicing their views or supporting candidates of their own choosing. Rather, § 9012(f) encourages this active individual political participation rather than the passive act of merely contributing to a political committee.[56]

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to further the election of publicly funded candidates. *Bellotti* applied to votes on referenda, 435 U.S. at 768; § 9012(f) is directed only at publicly funded presidential candidate election campaigns. *Bellotti* held that the Massachusetts statute was essentially an attempt by the state to control the focus and content of public debate, 435 U.S. at 785. However, § 9012(f) applies in a nonpartisan manner to all unauthorized political committees and only with regard to what would otherwise be qualified campaign expenditures incurred in support of publicly funded presidential candidates. Section 9012(f) does not in any manner limit issue discussion.

[55] *Buckley, supra,* held that the self-expression of the contributor to a political committee was accomplished by the symbolic act of making the contribution. 424 U.S. at 21. Section 9012(f) itself places no limitation whatsoever on an individual's right to contribute to political committees.

[56] Independent expenditures by individuals and authorized candidate committees for or against publicly funded presidential candidates totalled $1,994,111 during 1980. *See Data* at VI n.17 and VII.

In *Bellotti*, this Court expressly noted that restrictions on spending may well be permissible in the context of partisan candidate elections, where the governmental interest in preventing "corruption of elected representatives through the creation of political debts . . . has never been doubted." 435 U.S. at 787, n.26. The Court went on to make it clear that

> [t]he case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.

Id. The instant case, on the other hand, squarely poses the question of whether Congress may limit expenditures based upon its assessment of the implicit obligations that may result between those who amass and control vast sums and the publicly funded candidate on whose behalf these monies are spent. Indeed, it is this very question which this Court suggested should be answered in the affirmative:

> Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

435 U.S. at 787 n.26. Certainly, Congress is entitled to make the same finding with regard to expenditures by political committees and to enact prophylactic legislation.

Additionally, the district court's judgment disregards § 9012(f)'s function in serving the "compelling" governmental interest in protecting the stability of the political system by refraining from encouraging "splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government." *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). *See also Buckley*, 424 U.S. at 96. Such "unrestrained factionalism" was of much concern to the Founding Fathers. James Madison, for example, thought it a principal task of the new Constitution to hold the "mischief of factions" in check. Federalist No. 10 at 52 (H.C. Lodge ed. 1888).

Strong political parties serve the purpose of preventing factionalism in the political process. As Justice Powell has recognized,

> "[b]road-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals.

Branti v. *Finkel*, 445 U.S. 507, 532 (Powell, J., dissenting). And a distinguished panel of political scientists has concluded that:

> Without parties there can be no organized and coherent politics. When politics lacks coherence, there can be no accountable democracy; therefore, parties are indispensable to the realization of democracy, and financing is control to parties.

Hearings on H.R. 1 Before the Committee on House Administration, 96th Cong., 1st Sess. 392 (1979) (statement of the Committee on Party Renewal). Indeed, strong parties and candidates responsible to parties help "to make government accountable." *Elrod* v. *Burns*, 427 U.S. at 382 (Powell, J., dissenting).

The Fund Act and § 9012(f) preserve accountability in publicly financed presidential elections by placing a $1,000 ceiling on independent expenditures by non-party political committees. NCPAC Chairman John T. Dolan, recently noted the lack of accountability inherent in "independent expenditures,":

> I am against independent expenditures. I do not think they help the political process. . . They [independent expenditures] decrease accountability because we [NCPAC] could sit there and say that George McGovern . . . is cheating on his wife. Jim Abdnor can say "isn't that a terrible thing to say" and go right on and reap the benefits if that helps him. I think that candidates should be accountable for charges that are brought. . . .

Presentation of John T. Dolan, *FECA: After a Decade of Political Reform, A National Conference by Citizen's Research Foundation* (April 3, 1981). This problem of accountability is a uniquely sensitive one in the context

of a publicly financed presidential election with its attendant expenditure limitation.[57] As noted *supra*, one of the major purposes of the Fund Act was "to facilitate communication by candidates with the electorate." *Buckley*, 424 U.S. at 91. Such communication is not furthered when a candidate must carefully husband his or her resources to respond to the attacks of non-accountable political action committees. And such a result in the absence of § 9012(f) clearly contravenes the underlying purposes of the Fund Act, purposes this Court found "significantly important." *Buckley*, 424 U.S. at 95. The district court's ruling on § 9012(f) which failed to recognize the principles established by this Court in *Republican National Committee*, *supra*, *Buckley*, *supra* and *Bellotti*, *supra* and even to consider compelling governmental interests presented in *Storer* v. *Brown*, *supra*, should be reversed.

IV. 26 U.S.C. § 9012(f) IS CONSISTENT WITH FIRST AMENDMENT FREEDOMS OF SPEECH AND ASSOCIATION.

Rather than operating as a serious infringement on individual first amendment freedoms, as found by the district court, the Fund Act, including § 9012(f), is the result of congressional effort not solely to remedy particular

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[57] The presidential expenditure limitation for candidates accepting public funds, now contained in 2 U.S.C. § 441a(b)(1)(B), was in Title IX of the Federal Election Campaign Act Amendments of 1974. The 1974 amendments included a number of overall expenditure limitations as well as those for public financing. The expenditure limitation formula for the presidential general election, 26 U.S.C. § 9004, (originally enacted in Pub. L. No. 92-178), was revised and codified into the section containing all of the overall expenditure limitations in Title 18. 18 U.S.C. § 608(c)(1)(B). The Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-284 which eliminated the overall expenditure limitations as a result of the decision in *Buckley* moved all of the Title 18 provisions into Title 2, making them all part of the Federal Election Campaign Act rather than the Criminal Code, Pub. L. No. 94-284, §§ 112, 201, thus placing the expenditure limitation for public financing in its present location.

evils prevalent in privately funded presidential campaigns but to construct a comprehensive plan which "furthers . . . pertinent First Amendment values." *Buckley*, 424 U.S. at 93.[58] Congress specifically structured the Fund Act and FECA to encourage citizen participation in presidential general election campaigns through the voluntary taxpayer check-off plan. Since its inception in 1973, citizens have designated nearly 250 million of their income tax dollars to the fund.[59] The high level of citizen participation has, in turn, enabled every major party candidate since 1974 to opt for a general election campaign fully funded by public monies.[60] Thus, to date the fund has clearly succeeded in achieving the objectives which the Court approved in *Buckley*, 424 U.S. at 91, 101. Public financing has proven itself to be a genuinely viable alternative to the rigors of fundraising which attend privately funded campaigns. *Buckley*, 424 U.S. at 91. The candidates need not focus their attention on the demands of contributors and potential contributors but are free to reach out to the populous at large and deliver their message. Thus, as intended by Congress, public monies have facilitated communication by candidates with the electorate by providing them with an alternative means for conveying to the voters persuasive reasons for electing them. *Id.* at 91, 100 n.136, 101.[61]

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[58] Indeed, the public financing system represents "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93.

[59] According to the Internal Revenue Service, an average of 27% of all returns (including joint returns) processed between 1976 and 1979 indicated one or two dollar designations to the fund. "Presidential Fund-Income Tax Check-Off Status", Press Release Issued by Federal Election Commission, November 1980.

[60] No deficiencies in the fund have required that the candidates turn to private contributors." *See* 26 U.S.C. §§ 9003(b)(2), 9012(b).

[61] While the candidate may not accept private contributions to pay for "qualified campaign expenses," Congress has approved the Commission's interpretation of the term "qualified campaign ex-

Moreover, Congress, fully cognizant of the first amendment implications of the statute, offered numerous inducements for direct participation by voters in presidential campaigns by excluding certain activities from the definitions "contribution" and "expenditure" under FECA and the Fund Act while placing reasonable limits only on indirect forms of expression.[42] Thus, individuals are permitted to make unlimited independent expenditures to further the election of any presidential candidate. *See* 2 U.S.C. § 431(9) and (17); 26 U.S.C. § 9012(f).[43] *Republican National Committee*, 487 F. Supp. at 286, *aff'd mem.*, 445 U.S. 955 (1980). Individuals are free

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pense" to exclude, if the candidate so desires, legal and accounting services provided solely to ensure compliance with FECA and the Fund Act. *See* 11 C.F.R. § 9002.11(b)(5). Accordingly, individuals and organizations may, subject to FECA's contribution limitations, contribute to a separate fund established by the candidate to defray all legal and accounting compliance expenses. *See* 11 C.F.R. § 9003.3. This exemption for compliance expenses enables the candidates and their supporters to ensure that the candidates' allotment of public monies is put to the use for which it was intended: to facilitate the candidates' communication with the electorate. *Buckley*, 424 U.S. at 91.

[42] This Court has found that a statute, which restricts a desired activity for the purpose of achieving specific and legitimate legislative goals does not violate the first amendment merely because some individuals, with multiple avenues of expression available, wish to engage in the restricted activity. *See Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 771 (1976); *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *Kovacs* v. *Cooper*, 336 U.S. 77, 88-9 (1949).

[43] Nor does § 9012(f) apply to expenditures incurred by the media in reporting the news or taking editorial positions. 26 U.S.C. § 9012(f)(2)(A). Section 9012(f) further exempts expenditures incurred by a tax-exempt organization in communicating its views to its members 26 U.S.C. § 9012(f)(2)(B). Similarly, FECA extends this exemption to communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject. 2 U.S.C. § 441b(b)(2)(A). Section 9012(f) is narrowly drawn to apply only to expenditures by political committees in support of publicly funded presidential candidates.

to volunteer their services to any presidential candidate or political committee and to associate with and work for the candidate's political party. 2 U.S.C. § 431(8)(B)(i).[64] *See Buckley*, 424 U.S. at 22, 28, 48 n.54, *citing Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 579; *Republican National Committee*, 487 F. Supp. at 286, *aff'd mem.*, 445 U.S. 955 (1980). In rendering such volunteer services to assist a publicly financed candidate, individuals may use their real or personal property, provide invitations, food and beverages up to $1,000, and may spend an additional $1,000 on personal travel. 2 U.S.C. §§ 431(8)(B)(ii), 431(8)(B)(iv). These inducements exemplify "Congress' valid interest in encouraging citizens participation in political campaigns." *Buckley*, 424 U.S. at 36.

Nor does any provision of FECA or the Fund Act, including § 9012(f), limit an individual's ability to give or spend money to promote issues or to help issue-oriented groups. *See United States* v. *National Committee for Impeachment*, 469 F.2d 1135, 1139-42 (2d Cir. 1972); and *American Civil Liberties Union* v. *Jennings*, 366 F. Supp. 1041, 1055-57 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *ACLU*, 422 U.S. 1030 (1975). *See also Buckley*, 424 U.S. at 79 n.106. Indeed, the entire statutory scheme, including § 9012(f), effectively makes the same distinction between expenditures made to support publicly financed presidential candidates and other political activity as do the Hatch Act restrictions upheld in *United Public Workers* v. *Mitchell*, 330 U.S.

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[64] Indeed, individuals may engage in a variety of activities in coordination with the candidate's campaign which do not require the expenditure of their own funds, including: (a) writing research papers; (b) stuffing envelopes; (c) handing out leaflets (d) carrying signs; (e) manning phone banks; (f) writing letters to the candidate expressing opinions on current topics; (g) compiling lists of friends and contacts; (h) encouraging others to volunteer their time to the campaigns; (i) drafting and presenting questions for the party platform; (j) serving as a surrogate speaker; (k) door-to-door canvassing; (l) participating in voter registration drives; (m) participating in get-out-the-vote drives organized by the campaign or the candidate's party.

at 99-100 (1947) and *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 556.

Additionally, in structuring FECA and the Fund Act, Congress additionally recognized the central role played by political parties in presidential general election campaigns. While Congress ultimately concluded that the goals of the public financing system would best be served by providing the monies directly to the candidates rather than to the political parties,[65] numerous provisions were carefully designed to ensure the active participation of political parties in advancing the election of their nominees. Thus, FECA provides that individuals may contribute up to $20,000 per year to the committees maintained by a national political party; and political committees may contribute up to $15,000 annually to a national party's committees. 2 U.S.C. §§ 441a(a)(1)(B), (2)(B). The party may then, in turn, make expenditures in support of the party's presidential candidate of up to two cents for each member of the voting age public—an amount of $4,637,653.76 in 1980. 2 U.S.C. § 441a(d)(2), formerly 18 U.S.C. § 608(f); *Buckley*, 424 U.S. at 59 n.67. Individuals may freely associate with and contribute to state and local party committees; those committees may, in turn, defray without limit the costs of such grassroots activities as voter registration and get-out-the-vote drives on behalf of the party's presidential candidates. 2 U.S.C. § 431(8)(B)(xii). Similarly, a state or local party committee may incur unlimited expenditures for campaign materials, such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs, used by the committee in connection with volunteer activities on behalf of the party's presidential nominees. 2 U.S.C. § 431(8)(B)(x). The foregoing inducements to individual participation in political parties serve the legitimate interests recognized by this Court in *Buckley* of ensuring that public financing does not result in creating a system of splintered parties or encouraging unre-

[65] Under the Long Plan, the public funds would have been given directly to the political parties. *See* discussion, *supra* at 13-14.

strained factionalism. *Buckley*, 424 U.S. at 101. *See* discussion, *supra*, at 38-40.

The court below, however, ignored the positive impact of public financing on first amendment activity and rejected the distinction between individuals and political committees to which this Court has accorded constitutional significance. The district court stated that:

> the fact of receipt of contributions (to finance expenditures) does not distinguish political committees from any other association which takes an active position on a candidate. Likewise, a political committee is no different under the First Amendment from a wealthy individual who may . . . lawfully dedicate his entire fortune to make independent expenditures paying for the same public communications . . . which the committee would undertake.

FEC J.S. App. A at 24a.

But appellees are clearly not like a wealthy individual or like groups of individuals who retain control over the spending of their own funds to support candidates. Rather, AFC, AEP and FCM are paradigms of political committees a "major purpose of which is the nomination or election of a candidate" and which accordingly "fall within the core area sought to be addressed by Congress." *Buckley*, 424 U.S. at 79.[66] Appellee committees indicate

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[66] The statute does not limit a group of individuals making expenditures to amplify their voices in support of a publicly financed candidate so long as the individual participants retain control over their funds. As the Commission has noted in concluding that an individual was operating as a political committee:

> the operation described by the request does not involve the joint purchase by several individuals (each paying their respective shares of the purchase price directly to the vendor from personal funds) of printing or reproduction services to publish a brochure containing a message of election advocacy. Rather, what is described is the solicitation of funds from the general public which funds are used to influence the outcome of a Federal election pursuant to the decisions of [the Committee's leaders].

Advisory Opinion 1980-126, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577, at 10,713. Under this rationale, a group of indi-

that they are ongoing entities and will operate not simply as groups of individuals making "independent" expenditures on behalf of a single candidate during the 1980 election cycle. FCM, for example, has been in existence since 1972. Moreover, contributors to appellee committees do not exercise any control over the committees' policy or management other than in a highly indirect manner by refusing to contribute.[67]

Contributors to appellee political committees receive no assurance that their contributions will even be used for expenditures on behalf of a presidential candidate. Appellees are multi-candidate political committees which make contributions to more than 5 federal candidates. *See* 2 U.S.C. § 441a(a)(4). Indeed, Commission records reveal that all of the political committees in question have made contributions to both House and Senate candidates.[68]

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viduals who retain "control" over their funds, rather than relinquishing control by making a contribution, would not be a political committee. *See also* AO 1980-106, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5582; AO 1979-41, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5427 (a committee whose purpose is to draft candidates is a "political committee"); AO 1976-51, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5215 (a group becomes a political committee when one of its purposes is to receive and make "contributions" to federal candidates). Indeed, AEP, one of appellants herein, initially sought guidance from the Commission requesting an opinion that § 9012(f) did not prohibit its operations; that opinion request was withdrawn on July 1, 1980, so that the Commission had no opportunity to rule on the interpretation and extent of § 9012(f). *See* AOR 1980-61, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 3564 at 3179, *withdrawn*, ¶ 51 at 160.

[67] The district court believed that "[t]he contributors do have power over the speech disseminated by the political committees. . . . If a committee disappoints its membership, contributions will dry up." FEC J.S. App. A at 18a. Commission records disclose that for the last quarter of the general election period ending November 24, 1980, over 90% of the contributions to AFC and AEP are from one-time contributors to those committees. Nevertheless these committees were able to amass and spend $1,982,064 to further the election of publicly funded candidates in 1980.

[68] For example, through December 31, 1980, AFC indicated in its reports that it made over $17,250 in contributions to 21 federal

Additionally, much of the money received by the three appellee political committees has been channeled into areas other than direct speech.[69] It is clear that an individual contributing to any of the three appellee political committee has no assurance that the money contributed will actually be used "to speak one's mind." [70] *Buckley,*

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candidates and that as of December 31, 1980, it had a cash-on-hand balance of $11,425.09 and outstanding debts totalling $46,552.77. Similarly, during the period ending December 31, 1980, AEP made $14,000 in contributions to 14 federal candidates, had a cash-on-hand balance of $46,065.19 with no outstanding debts. During the period ending November 24, 1980, FCM made approximately $146,306 in contributions to 83 federal candidates, had a cash-on-hand balance of $48,781 and outstanding debts of $183,394. FCM's contributions were made during 1979 and 1980.

[69] In fact, approximately 25-30% of all monies spent by these committees went for operating expenses. These expenses include legal and accounting fees, salaries, office and furniture rental, surveys and poll research, travel and lodging, and office supplies. The extent to which a contributor's money is spent for non-speech is best illustrated by the following data:

Multicandidate Political Committee	Total Disbursements	Operating Expenditures	% of Total Disbursement
FCM	3,046,454	730,735	23.98
AEP	1,874,312	579,267	30.90
AFC	1,061,123	324,412	30.57

See Data at 184, 222 and 224. The line 19 operating expenditures for FCM, AEP and AFC are found at these respective FEC microfilm locations: 80/03/182/2202; 80/03/176/2825; and 80/03/176/2645.

[70] Paul Wilson, an associate of Bailey and Deardourff, and media consultant to AEP, has observed:

> The vast majority [of independent expenditure committees] were really fronts for fundraising in order to increase the donor base of various groups. They would charge high overhead and mail out thousands of letters, millions in some cases, to increase their number of donors. The problem with that is that, you have very little of that money . . . going to the actual purpose for which it is raised.

Presentation by Paul Wilson, *FECA: After a Decade of Political Reform, A National Conference by Citizen's Research Foundation* (April 3, 1981).

424 U.S. at 48, *citing New York Times* v. *Sullivan*, 376 U.S. at 269.

Clearly, the district court erred when it concluded that AFC, AEP and FCM are "simply 'pooling agents' for many small voices [71] wishing to make intelligible political statements" and that "[t]he money expended by the committees pays for political communications which speak the language of their members [72] and contributors." FEC J.S. App. A at 17a. The district panel did not and could not identify any factual example of the agent-principal relationship between appellee political committees and their contributors, the relationship which stood as the sole basis for the panel's decision to abrogate Congress's judg-

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[71] During the last quarter of the 1980 election year cycle, FEC records indicate that the "small voices" to which the court referred made an average itemized contribution of $1,120 to AEP, $700 to FCM and $750 to AFC. By comparison, "in the 1976 primary campaign, Reagan raised an average of $48.75 from 185,000 contributors." *Republican National Committee*, 487 F. Supp. at 299, *aff'd mem.*, 445 U.S. 955 (1980).

[72] The district court was apparently of the opinion that appellees are membership organizations, a conclusion which finds no basis in law or fact. Only AEP even so much as claims that its contributors are "members." It is clear, however, that none of appellee committees, including AEP, exhibit the indicia of membership organizations set forth by this Court in *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333, 344-345 (1977). Unlike the members of the organizations in *Hunt*, contributors to appellee committees do not participate in selecting the officers or directors of the committees. There is no indication whatsoever that the officers or directors of appellees must even contribute to the committee. Nor are the costs of appellees' activities financed by levying assessments upon the contributors. Indeed, the district court acknowledged that the only means by which contributors could exercise control over the activities of appellee committees was by refusing to contribute. The contention that the contributors' power to withhold contributions demonstrates sufficient control over the organization to elevate them to the status of "members" has, however, been rejected. *See Federal Election Commission* v. *National Right to Work Committee*, 501 F. Supp. 422 (D.D.C. 1980), *appeal docketed*, Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980); *Health Research Group* v. *Kennedy*, 82 F.R.D. 21 (D.D.C. 1979).

ment.[73] Rather than serving as mere "pooling agents" for thousands of "small voices," the relationship between appellee political committees and their contributors has been more accurately perceived by members of Congress:

> In essence these people are asked to pour money into the wide mouth of a funnel without any real idea of where the spout came out. The only thing they know is that "it will help the cause."

120 Cong. Rec. 27,244 (1974) (remarks of Rep. Brown). And as the United States Court of Appeals for the Ninth Circuit (en banc) recently observed, "political action committees have become vast, unaccountable, and low visibility centers of electoral influence . . . natural targets for candidate influence." *California Medical Association* v. *Federal Election Commission, supra* at 50,990, 50,991.

Moreover, this Court has already recognized the attenuated relationship between contributions to political committees and the contributors' interests in speech and association. In *Buckley, supra*, this Court recognized that a contribution is entitled to less protection under the first amendment being a symbolic expression of support:

> While contributions may result in political expression if spent by a candidate *or an association* to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

424 U.S. at 21. (emphasis added). Nevertheless, the district court concluded that "speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or

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[73] A review of appellee committee's itemized disbursements seriously draws into question the district court's conclusion that "the money expended by the committees pays for political communications which speak the language of their members and contributors." FEC J.S. App. A at 17a. For example, on December 15, 1980, approximately 6 weeks after the November 4 election, AFC expended $6,675 for the "purchase of tickets" from the John F. Kennedy Center for the Performing Arts and $2,000 for the "purchase of Inaugural tickets" from the Reagan Inaugural Committee. FEC Microfilm Location 80/03/176/2656.

her constituent supporters (or, contributors to the non-publicly funded candidate)." FEC J.S. App. A at 19a. This conclusion is plainly erroneous as a matter of law in light of the constitutional distinction drawn between contributions and expenditures in *Buckley, supra.* Contributions are merely a symbolic, indirect form of speech; thus, § 9012(f) limits the speech of the individual contributors only to the extent that it limits the manner in which a political committee may spend the funds contributed.

If appellees were the mere "pooling agents" that the district court envisioned them as being, then they would not, as a matter of law, be multi-candidate political committees. Clearly appellees are the paradigm of political committees which Congress recognized would subvert the goals of public financing if permitted to incur large expenditures to further the election of publicly funded candidates. Surely Congress is entitled to conclude that expenditures such as those incurred by appellees would reduce the candidates' public allotment to little more than a subsidy and pose a substantial risk of creating "political debts." *See Bellotti,* 435 U.S. at 787 n.26. Thus, § 9012(f) is part and parcel of the public financing scheme. It furthers the goals which Congress sought to achieve in devising the Fund Act and serves first amendment values.

V. SECTION 9012(f) SERVES SUFFICIENTLY COMPELLING GOVERNMENTAL INTERESTS TO SUSTAIN EVEN A SIGNIFICANT INTERFERENCE WITH FIRST AMENDMENT RIGHTS.

Even if viewed as a substantial restriction on first amendment interests, § 9012(f) must still be sustained based on this Court's prior holdings that the asserted governmental interests underlying the Fund Act and its integral provisions are compelling. *Buckley,* 424 U.S. at 95; *Republican National Committee, supra, see* section III, *supra.* The legislative history and subsequent events supporting the congressional judgment demonstrate that § 9012(f) is essential to achieving those purposes of

public funding approved by this Court as significant and compelling. *See* sections I and II, *supra*. Section 9012(f) is narrowly drawn, applicable only to political committees making independent expenditures in support of publicly funded presidential candidates, and is necessary to protect the integrity of the congressional program. *See* section IV, *supra*. Section 9012(f) must therefore be upheld.

CONCLUSION

For reasons set forth herein, this Court should reverse the judgment of the United States District Court for the District of Columbia and hold 26 U.S.C. § 9012(f) consistent with the first amendment to the Constitution of the United States.

Respectfully submitted,

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MAY 9, 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 340556 327

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ALEXANDER L. STEVAS
CLERK

No. 80-1067

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

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TABLE OF AUTHORITIES

Cases:	Page
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	4
Buckley v. *Valeo*, 424 U.S. 1 (1976)	*passim*
Burroughs v. *United States*, 290 U.S. 534 (1934)	5
California Medical Association v. *Federal Election Commission*, 641 F.2d 619 (9th Cir. 1980) (en banc), *aff'd*, —— U.S. ——, 101 S.Ct. 2712 (June 26, 1981)	4, 5
Johnson v. *Robison*, 415 U.S. 361 (1974)	10
Speigel, Inc. v. *Federal Trade Commission*, 540 F.2d 287 (7th Cir. 1976)	10
United States v. *Pipefitters*, 407 U.S. 305 (1972)	4

Statutes and Regulations:	
2 U.S.C. § 437f	5
26 U.S.C. § 9012(b)	6, 7
26 U.S.C. § 9012(f)	*passim*
Pub. L. No. 92-225, 86 Stat. 3 (1972)	8
11 C.F.R. § 114.5(d)	4

Legislative History:	
112 Cong. Rec. 13,544 (1966)	9
112 Cong. Rec. 28,765 (1966)	9
112 Cong. Rec. 28,781-2 (1966)	9
112 Cong. Rec. 28,784 (1966)	9
113 Cong. Rec. 8061-63 (1967)	9
113 Cong. Rec. 8295 (1967)	9
113 Cong. Rec. 8308-09 (1967)	9
113 Cong. Rec. 9385 (1967)	9
113 Cong. Rec. 11,480 (1967)	9
117 Cong. Rec. 41,763 (1971)	9
117 Cong. Rec. 41,777 (1971)	9
117 Cong. Rec. 41,947 (1971)	8
117 Cong. Rec. 41,953 (1971)	8
117 Cong. Rec. 42,399 (1971)	9
117 Cong. Rec. 42,952 (1971)	9
H. R. Rep. No. 96-442, 96th Cong., 1st Sess (1979)	10

Miscellaneous: Page

AOR 1976-28, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6062 11
AOR 1980-61, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 3564, *withdrawn*, ¶ 51 6
AO 1976-35, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5206 11
National Journal, September 13, 1980 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1067

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

1. Appellees argue that Congress cannot, consistent with the Constitution of the United States, limit expenditures of organized political committees in order to assure that public financing will not become merely a subsidy for private campaign spending. They contend that the individual first amendment freedoms of a candidate's supporters are abridged when Congress limits the ability of political committee organizers to accept and transform contributions into expenditures.[1] However, appellees are not merely groups of individuals who joined to-

[1] Appellee Americans for an Effective Presidency ("AEP") also argues that § 9012(f) intrudes on "issue discussion." AEP Br. at 21-22. The Fund Act was structured to encourage direct political participation by individuals and does not affect purely issue discussion. Federal Election Commission's ("FEC") Brief ("Br.") at 40-44.

gether to publish their views on the 1980 election. Rather, they are the paradigm of political committees, controlled by experienced political supporters of the candidate, who expend funds they have solicited from others for the purpose of enhancing the candidate's election campaign, with the realistic expectation of "earn[ing] some measure of loyalty from a candidate . . . [by] effectively advocat[ing] the candidate's election." Americans For Change ("AFC") Brief ("Br.) at 44. As such, appellees represent the very danger to the integrity of the public financing scheme that § 9012(f) was intended to forestall.

The undisputed facts concerning the character of appellees demonstrate that they fall "within the core area sought to be addressed by Congress." *Buckley* v. *Valeo*, 442 U.S. 1, 79 (1976) (*"Buckley"*). Contrary to their arguments, appellees are not merely "pooling agents" for "small voices" of individuals seeking to make their political speech more effective. FEC Jurisdictional Statement ("J.S.") at 17a. They are clearly not similar to an individual, or a group of individuals, who spend their own funds to express their support for a candidate. Rather, they are ongoing entities[2] managed by sophisticated

[2] *See* FEC Br. at 25-26, 45-46. In the year since the 1980 presidential election, appellee committees have continued to be politically active. The public reports filed with the FEC for the period January 1, 1981 through July 1981 disclose that AFC received approximately $261,731 in contributions and expended approximately $235,175, only $5,270 of which was used to retire debts and obligations from the 1980 election; Fund for a Conservative Majority ("FCM") received approximately $585,223 in contributions and has already expended approximately $566,217, including $10,799 in contributions to 12 candidates for the 1981-82 election cycle; and AEP received approximately $2,625 in contributions and expended approximately $36,021. Appellees' disclosure reports are available for inspection at the Commission.

political professionals,[3] whose contributors have no voice either in the policies or operation of the committees, or in determining how, where, when and for whom money will be spent.[4]

These permanent, well organized political committees have displayed their ability to amass large campaign coffers to spend on presidential elections.[5] Spending by unauthorized political committees on behalf of presidential candidates has increased dramatically during the past four years. FEC Br. at 24. The level of spending by such committees during the 1980 elections demonstrates their ability to exert a significant influence on the electoral process—an influence which no presidential candidate can afford to ignore. Indeed, expenditures by such committees

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[3] AFC is run by a "steering committee that includes 63 corporate executives, 34 retired House members, 5 Senators, 10 retired governors and 5 former ambassadors." National Journal, September 13, 1980, at 1515. AEP is "laden wtih former officials from the Ford and Nixon Administrations." *Id.* See FEC Br. at 25 n.35.

[4] Indeed, contributors to these multicandidate committees cannot be certain that their contributions will be used by the committees to advocate the election of any particular candidate. See FEC Br. at 46-47. In fact, contributors cannot be sure their contributions will be used for political advocacy. For example, public disclosure reports reveal that AEP in early 1981 spent $6,283.53 for an "inaugural party" in Washington, D.C.; in May, 1981, AFC expended $5,500 for tickets to a "gala"; and in January, 1981 it expended $4,000 as a "performance fee."

[5] *See Data Compiled From the Public Records of the Federal Election Commission* at VII; FEC Br. at 26, 45-48.

might well come to exceed the total allotment for a publicly funded candidate, with the result that the candidate's own publicly funded campaign would become subordinated to the campaign activities of unauthorized political committees. This would return the candidates to the very position of dependence upon private funds which the Fund Act was designed to eliminate.[6] *See* FEC Br. at 18-27.

Since the appellees thus fall "squarely within the 'hard core' of the statute's proscription," they may not in this suit challenge the constitutionality of § 9012(f) as if it were sought to be applied to mere groups of individuals who pooled their resources to amplify their political speech in the media. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). *See California Medical Association* v. *Federal Election*

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[6] Data from the 1979-1980 presidential election cycle reveals the vast financial resources upon which nonaccountable political action committees may draw to make unlimited expenditures. For example, only four corporate separate segregated funds out of 1,249 made independent expenditures during the 1980 campaign, which totalled $2,767. Absent the § 9012(f) ceiling, these corporate separate segregated funds would be able to use a higher percentage of their receipts ($34,197,824 in the 1979-80 election cycle) for such expenditures in the 1984 presidential election. This Court has recognized that a separate segregated fund established and maintained by a corporation is but an extension of the corporation, the only separation being a separate account. *United States v. Pipefitters*, 407 U.S. 305, 413-17, 421, 426, 429 (1972). *See California Medical Association v. Federal Election Commission*, 641 F.2d 619, 631 (9th Cir. 1980) (en banc), *aff'd* —— U.S. ——, 101 S. Ct. 2712 (June 26, 1981). *See also* 11 C.F.R. § 114.5(d).

Commission, 101 S.Ct. at 2722 n. 17.[7] Indeed, not only does the application of the Act to the appellees not abridge the rights of the appellees' contributors to engage in political expression, either individually or jointly,[8] but it also does not interfere with the rights of the managers of such political committees to engage in political expression, either individually or jointly. Rather, application of § 9012(f) to appellees only limits the managers of these political committees in their use of funds collected from other political committees and individuals to enhance their own political speech. The Commission submits that this narrow application of the statute in furtherance of an important purpose of the Fund Act does not unnecessarily intrude upon first amendment rights.

2. Even though § 9012(f) by its terms limits all "expenditures" by unauthorized political committees without exception, AFC and AEP argue that it is inapplicable to their activities because Congress intended that § 9012(f) only limit expenditures authorized by the candidate, and not "inde-

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[7] Appellees' challenge to the term "political committee" as too vague was rejected by this Court in *Buckley*, 424 U.S. at 79. *See also Burroughs v. United States*, 290 U.S. 534 (1934). Moreover, Congress amended the law explicitly to provide an opportunity for any person to seek an advisory opinion on statutory coverage, which must be rendered within 60 days (within 20 days to a candidate before an election). 2 U.S.C. § 437f.

[8] "[T]he transformation of contributions into political debate *involves speech by someone other than the contributors.*" *California Medical Assn. v. Federal Election Commission*, 101 S. Ct. at 2722 (emphasis in original), *quoting Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

pendent" expenditures.[9] The court below correctly rejected this argument. Not only do the expenditures of appellees constitute the very danger to the integrity of the public financing scheme which Congress intended § 9012(f) to forestall, see discussion, *supra* at 1-4, but unless § 9012(f) is interpreted to reach appellees' ostensibly "independent" expenditures,[10] it is entirely meaningless.

Section 9012(b) expressly precludes publicly financed presidential candidates from accepting any contributions at all; and as this Court held in *Buck-*

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[9] Beyond its simple assertion that § 9012(f) does not apply to "independent" expenditures, AEP pressed no limiting construction of the statute before the district court and, in fact, withdrew its request for an advisory opinion concerning the construction of § 9012(f) two days before the Commission was to consider a response. *See* AOR 1980-61, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 3564 at 3179 *withdrawn* ¶ 51 at 160. In this Court, AEP still advances no explanation whatsoever of the provision's meaning or purpose. FCM concedes, as it did below, that § 9012(f) applies to its expenditures in support of publicly funded presidential candidates. *Amici* American Civil Liberties Union and Southeastern Legal Foundation have also agreed that § 9012(f) applies to all expenditures by political committees on behalf of publicly funded presidential candidates, including those expenditures made "independently" of a candidate's official campaign. Only AFC argues that § 9012(f) should be construed as a $1,000 limitation on contributions to presidential candidates who opt to receive public financing.

[10] AFC incorrectly states that "all parties concede in these cases that appellees, including AFC, have not coordinated their expenditures with any eligible candidate." AFC Br. at 13-14. As AFC itself notes, the administrative complaint filed by Common Cause alleging "that AFC was not independent of the official Reagan Campaign . . . is still pending" before the Commission. AFC Br. at 4 n.10.

ley, 424 U.S. at 46-47, Congress considered expenditures authorized by, or coordinated with, a candidate to constitute contributions. It would be grossly inconsistent for Congress to prohibit all contributions, including authorized expenditures, under subsection (b), and then add subsection (f) merely to permit these same coordinated expenditures up to $1,000. To circumvent the statute's plain language, AFC argues that an "expenditure to further the election" of publicly funded candidates can *only* include an expenditure that has been authorized or requested by the candidate or his authorized committees or agents, a novel result which AFC achieves only by ignoring the very terms of § 9012(f) itself. As the district court properly concluded:

> If the limiting construction were correct, that is, if the expenditure prohibition applied only to expenditures authorized or requested by the candidate, then the section's existing proviso that only such expenditures are prohibited as "would constitute qualified campaign expenses if incurred by an authorized committee of [the] candidate[]" would be more or less superfluous. The prohibited coordinated, or non-independent, expenditures would then *all* be qualified campaign expenses rendering the proviso unnecessary. [footnote omitted].

FEC J.S. at 7a-8a (emphasis in the original).

AFC and AEP are also incorrect in arguing that "independent" spending was limited only by FECA and not by the Fund Act. FECA, as enacted in 1971, limited only certain types of expenditures, and that limit was generally applicable to all supporters of

any candidate for federal office.[11] Section 9012(f) of the 1971 Fund Act, on the other hand, was narrowly directed at a specific problem relating to publicly funded presidential campaigns. Thus, it is operative only in the context of a publicly funded presidential campaign and only limits campaign spending by unauthorized political committees supplementing the candidate's campaign. Moreover, unlike FECA, § 9012(f) limits *all* expenditures in excess of $1,000 by such unauthorized political committees. Section 9012(f) was designed to play a separate, vital role in the public financing system: to forestall the reduction of public financing to a mere subsidy to an otherwise privately funded campaign. Without this precaution, public financing would fail to attain its highest purpose of liberating the American presidency "from the power of money to control it." 117 Cong. Rec. 41,947 (1971) (remarks of Sen. Long).[12]

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[11] As AFC concedes, Title I of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) applied only to media expenditures. AFC Br. at 15. Thus, there is no merit whatsoever to AFC's broad assertion that "[u]nder this original statutory scheme there could be no independent expenditures since Title I of FECA required that *all expenditures* be approved in advance by the candidate." AFC Br. at 16. (emphasis added).

[12] The colloquy between Senators Goldwater and Pastore, upon which AFC relies for this proposition does not support its position. AFC Br. at 16. Senator Pastore's remark was that the limitation of *individual* expenditures by a candidate's brother, which Senator Goldwater was addressing, had been dealt with in FECA. Senator Goldwater responded that his remarks were intended to encompass his concerns about the FECA limitations, since he had not had the opportunity to speak about that bill earlier. Neither Senator made reference to the Fund Act's narrow limitation on spending by political committees to support publicly financed presidential campaign. *See* 117 Cong. Rec. 41,953 (1971).

The construction of the statutory provision proffered by AFC ignores not only the explicit words of the statute, but the very essence of the debate in Congress. The need for appropriate safeguards to ensure the integrity of the public financing scheme was explicitly raised, and raised again, in 1966 and 1967, as well as 1971. 112 Cong. Rec. 13,544 (1966) (remarks of Sen. Gore); 112 Cong. Rec. 28,765 (1966) (remarks of Sen. Long); 112 Cong. Rec. 28,781-2 (1966) (remarks of Sen. Gore); 112 Cong. Rec. 28,784 (1966) (remarks of Sen. Gore); 113 Cong. Rec. 8061-63 (1967) (remarks of Sen. Gore); 113 Cong. Rec. 8295 (1967) (remarks of Sen. Long); 113 Cong. Rec. 8308-09 (1967) (remarks of Sen. Long); 113 Cong. Rec. 9385 (1967) (remarks of Sen. Tydings); 113 Cong. Rec. 11,480 (1967) (remarks of Sen. Long). *See also* FEC Br. at 7-24. Both proponents and opponents of § 9012(f) shared that understanding; amendments were proposed both to expand and contract that limitation. *See* FEC Br. at 21-23; 117 Cong. Rec. 41,777 (1971) (remarks of Sen. Kennedy) ("unauthorized committees supporting candidates who elect public financing are limited to expenditures of $1,000" and "by allowing unauthorized committees to spend up to $1,000 for their candidate, the amendment avoids the first amendment objections that might be raised against any complete prohibition of private spending"); 117 Cong. Rec. 42,399 (remarks of Sen. Pastore) ("we are talking about committees that have not been authorized"); 117 Cong. Rec. 42,952 (remarks of Sen. Dole) ("the unauthorized committees could also solicit funds and use them for any purpose, provided they did not spend more than $1,000 to elect a President or Vice President"). *See also* 117 Cong. Rec. 41,763 (1971) (remarks of Sen. Pastore) (Summary of Fund Act). Thus, § 9012(f) was clearly not legislation by inadvertence or silence;

the issue joined over the Fund Act's provision in § 9012(f) was precisely the extent to which such expenditures outside the presidential campaign should be limited. That independent expenditures were also addressed in FECA by a Congress that believed that control of such expenditures was important for reasons apart from public financing concerns is certainly true. But with regard to the Fund Act, Congress also saw various limitations, including § 9012(f), as explicitly necessary to guarantee that public financing be a substitute for, rather than a subsidy to, private financing. *See* FEC J.S. at 23. As this Court observed in upholding the Fund Act over an equal protection challenge from minor parties, Congress sought to enact limitations on the amounts that could be spent on behalf of a publicly funded candidate, not to give major party candidates a publicly subsidized head start in the race for campaign funds. *See Buckley*, 424 U.S. at 99.

Appellees seek to support their argument by suggesting that the Commission's contemporaneous construction was that § 9012(f) would be unconstitutional unless construed to permit unlimited independent expenditures. Apart from the serious constitutional question that would arise if an agency saw fit to nullify a Congressional direction on the grounds of its own constitutional doubt,[13] Commission regulations affirm its belief in the viability of the $1,000 limitation of § 9012(f) by extending that same limit to expenditures by local party committees.[14]

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[13] *See, e.g., Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Speigel, Inc. v. Federal Trade Commission*, 540 F.2d 287, 294 (7th Cir. 1976).

[14] The problem addressed by that regulation was obviated by Congress in the 1979 Amendments. *See, e.g.*, H.R. Rep. No. 96-442, 96th Cong., 1st Sess. at 10 (1979) ("The

AEP similarly argues that the Commission, through a staff informational letter and an advisory opinion, *sub silentio* rejected this approach to the statute by failing to note that expenditures would be limited to $1,000 by § 9012(f). AEP Br. at 19. However, neither request raised that question: one group explicitly indicated that their expenditures would be less than $1,000, AOR 1976-28, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6062; the other only sought approval of the wording of a disclaimer of authorization for permitted expenditures, AO 1976-35, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5206. Finally AFC argues that the Commission regulations, which define qualified campaign expenses as those authorized or requested by a candidate on his or her behalf, effectively narrowed the scope of the statute. AFC Br. at 24-25. To the contrary, those regulations merely sought to assure publicly funded candidates that qualified campaign expenses are not chargeable to their expenditure limits unless specifically authorized or requested.

In sum, the district court was correct in concluding that the plain terms of § 9012(f) demonstrate Congress's intent to reach precisely those expenditures made by unauthorized political committees, independent of the candidate, which "*would* constitute qualified campaign expenses" *if* they had been incurred (authorized or requested) by the candidate or agents of the candidate. Thus, AFC's arguments that § 9012(f) reaches only expenditures *actually* authorized by the candidate contradicts the express

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purpose of the provision is to provide state and local organizations with means to support Presidential and Vice Presidential nominees since they are prohibited from making contributions if the nominees accept general election public financing.")

language of the statute itself and would undermine the purpose of § 9012(f)—to ensure that public funding will be a substitute for private campaign financing and not a mere supplement to it.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, this Court should reverse the judgment of the United States District Court for the District of Columbia and hold 26 U.S.C. § 9012(f) consistent with the first amendment to the Constitution of the United States.

Respectfully submitted,

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SEPTEMBER 28, 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 355230 626